FILE COPY

Office Supreme Court, U.S.
FILED
OCT 27 19[illegible]

JAMES R. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 45 and 46

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK, *Respondents*

NATIONAL COAL ASSOCIATION, ET AL., *Petitioners*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK, *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

JAMES B. HENDERSON
WILLIAM N. BONNER, JR.
3100 Travis Street
Houston, Texas

THOMAS F. BROSNAN
821 Fifteenth Street, N. W.
Washington 5, D. C.
Of Counsel

RICHARD J. CONNOR
JOHN T. MILLER, JR.
821 Fifteenth Street, N. W.
Washington 5, D. C.
Counsel for Respondent Transcontinental Gas Pipe Line Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	4
Summary of Argument	13
Argument	19
I. Transco Having Met the Standards of Section 7(e) of the Natural Gas Act, the Commission is Required to Issue to It the Certificate of Public Convenience and Necessity Applied For	19
II. The Commission's Denial-Factors or "Policy Considerations" Are Without Foundation in the Record, Are Without Rational Basis Either Within or Without the Record and Are Completely in the Realm of the Chimerical	23
III. The Factors or "Policy Considerations" Upon Which the Commission Denied the Certificate Are in Conflict With the Intent and Policy of Congress as Expressed in the Natural Gas Act	47
A. The Commission Has Exceeded Its Jurisdiction and Authority Over Transportation in Interstate Commerce Under the Natural Gas Act	49
B. The Commission Does Not Have General Conservation Authority Through Control of Production, or Direct Sales by Producers, or "End Use"	52
1. The Natural Gas Act	53
2. Legislative History	54
(a) The Federal Trade Commission Report	54

Page

(b) The Natural Gas Act as Enacted in 1938 57

(c) The 1942 Amendment 59

(d) G-580 Investigation 63

(e) Commission Reports 65

3. "Consideration" of End Use in Certificate Proceedings ..... ;

C. The Commission Has Unfairly Discriminated Against Transco, Con Edison and the City of New York in Denying Access to Sources of Natural Gas Supplies to Which Other Persons Have Opportunity of Free Access 67

IV. The Commission's Decision is Contrary to the Policy Set Forth in the Antitrust Laws 79

A. The Provisions of the Natural Gas Act Make It Patent That Congress Intended That the Interstate Natural Gas Pipelines Would Not Be Disabled in Their Attempts to Compete Vigorously With Other Fuels in Supplying Industrial Requirements 81

B. The Commission May Not Ignore the Intent of Congress as Expressed in the Antitrust Laws 86

V. The Commission Has Refused to Give Proper Consideration to the Intent of Congress as Expressed in Air Pollution Legislation 89

VI. Coal Petitioners and *Amici Gas* Utilities 98

A. Coal Petitioners Are Interested Solely in Serving Their Own Economic Interests 98

B. *Amici*, Southern California Gas Company and Southern Counties Gas Company of California, Are Seeking to Preserve Their Market From Competition By Other Sources of Natural Gas 100

Page

VII. The Remand of the Court of Appeals With Directions to Issue the Certificate Was Proper .. 102

Conclusion 107

Appendix A.

Appendix B.

Appendix C.

TABLE OF CITATIONS

Court Decisions

Allen Bradley Co. v. Local 3, International Bhd. of Elec. Workers, 325 U. S. 797 (1945) 87

Alston Coal Co. v. Federal Power Commission, 137 F. 2d 740 (10th Cir. 1943) 85

Atalanta Trading Corp. v. Federal Trade Commission, 258 F. 2d 365 (2d Cir. 1958) 88

Atlantic Refining Co. v. Public Service Commission, 360 U. S. 378 (1959) 30, 39

City of Pittsburgh v. Federal Power Commission, 237 F. 2d 741 (D.C. Cir. 1956) 66, 67, 86

Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581 (1945) 53

Colorado-Wyoming Gas Co. v. Federal Power Commission, *et al.*, 324 U. S. 626 (1945) 25

Department of Conservation v. Federal Power Commission, 148 F. 2d 746 (5th Cir. 1945), *cert. denied* 326 U. S. 717 (1945) 42

Federal Communications Commission v. Sanders Bros., 309 U.S. 470 (1940) 61, 62

Federal Power Commission v. East Ohio Gas Company, 338 U. S. 464 (1950) 60

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 (1944) 51, 53, 84, 88

Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U. S. 498 (1949) 47, 50, 53, 68

Georgia v. Pennsylvania Railroad, 325 U. S. 439 (1945) 88

Interstate Commerce Commission v. Parker, 326 U. S. 60 (1945) 48

McLean Trucking Company v. United States, 321 U. S. 67 (1944) 86

Page

Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502 (1941) 86
National Coal Association v. Federal Power Commission, 191 F. 2d 462 (D.C. Cir. 1951) 62
Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 232 F. 2d 467 (3d Cir. 1956), *cert. denied* 352 U. S. 891 (1956) 51
Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 342 U. S. 329 (1951) 50
Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U. S. 507 (1947) 50
Pennsylvania v. West Virginia, 262 U. S. 553 (1923) .. 68
Schaffer Transportation Company v. United States, 355 U. S. 83 (1957) 48
South Carolina Generating Company v. Federal Power Commission, 249 F. 2nd 755 (4th Cir. 1957), *cert. denied* 356 U. S. 912 (1958) 26
State of Missouri v. Kansas Natural Gas Company, 265 U. S. 298 (1924) 67
United Gas Pipe Line Company v. Mobile Service Corporation, 350 U. S. 332 (1956) 69
United States v. Abilene & Southern Railway Co., 265 U. S. 274 (1924) 24
United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (1898), Modified, 175 U. S. 211 (1899) 87
United States v. Borden Co., 308 U. S. 188 (1939) 87
United States v. Columbia Gas & Electric Corp., 36 F. Supp. 488 (D. Del. 1941) 86
United States v. Sisal Sales Corp., 274 U. S. 268 (1927) 87
Universal Camera Corp. v. National Labor Rel. Board, 340 U. S. 474 (1951) 26

FEDERAL POWER COMMISSION CASES

Atlantic Seaboard Corp., *et al.*, 7 F.P.C. 1087 (1948) .. 76
El Paso Natural Gas Company, 19 F.P.C. 393 (1958).. 102
El Paso Natural Gas Company, 22 F.P.C. 900 (1959) .. 101
Gulf Interstate Gas Company, 12 F.P.C. 116 (1953) 76
Houston Texas Gas & Oil Corp., *et al.*, 16 F.P.C. 118; affirmed *sub nomine*, Florida Economic Advisory Council v. Federal Power Commission, 251 F. 2d 643 (D.C. Cir. 1957), *cert. denied* 356 U. S. 958 (1958) 30, 77, 102

Page

Kansas Pipe Line & Gas Company, 2 F.P.C. 29 (1939) 59, 75
Memphis Natural Gas Company, 4 F.P.C. 197 (1944) .. 64
Michigan-Wisconsin Pipe Line Company, 6 F.P.C. 1 (1947) 37
Midwestern Gas Transmission Company, 21 F.P.C. 653 (1959) 31, 102
Montana Power Company, 10 F.P.C. 950 (1951) 51
Tennessee Gas and Transmission Co., 3 F.P.C. 574 (1943) 63
Tennessee Gas Transmission Company and Niagara Gas Transmission Limited, 12 F.P.C. 311 (1953) .. 29, 76
Trans-Continental Gas Pipe Line Company, Inc., 7 F.P.C. 24 (1948) 86
Transcontinental Gas Pipe Line Corporation, 14 F.P.C. 1 (1955) 33
Transcontinental Gas Pipe Line Corporation, 17 F.P.C. 360 (1957) 33
Transcontinental Gas Pipe Line Corporation, 18 F.P.C. 710 (1957) 33
Transcontinental Gas Pipe Line Corporation, 20 F.P.C. 264 (1958) 33
Transcontinental Gas Pipe Line Corporation, *et al.*, 20 F.P.C. 843 (1958) 30
Transcontinental Gas Pipe Line Corporation, 22 F.P.C. 836 (1959) 18, 33, 104
Transcontinental Gas Pipe Line Corporation, F.P.C. Docket No. G-13590 ..... 4, 7, 18, 104
Transcontinental Gas Pipe Line Corporation, F.P.C. Docket No. G-2017 ..... 33, 34
Transcontinental Gas Pipe Line Corporation, Docket No. CP61-64 32
Trunkline Gas Company, *et al.*, 21 F.P.C. 704 (1959) .. 35

TABLE OF STATUTES

Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. §§ 1001-1011 ..... 26, 46

Air Pollution Control Act of 1955, 69 Stat. 322, as amended, 42 U.S.C. §§ 1857-1857g (1957) 3, 66, 93, 94, 95, 96

Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1952) (Supp. IV, 1957) 3, 17

Page

Natural Gas Act, June 21, 1938, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w
Section 1(a) 36, 55
Section 1(b) 39, 49, 53, 54, 68, 98
Section 2(6) 49
Section 4 39
Section 4(b) 51, 72
Section 4(e) 54, 94
Section 5 ..... 39, 82
Section 5(a) 81, 99
Section 7 ..... 3, 39, 40, 46, 47, 51, 52
Section 7(a) 73
Section 7(c) 57, 58
Section 7(e) 13, 19
Section 11 53
Section 19(b) 2
Section 20(a) 40, 86

Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7, 15 (1952) (Supp. IV, 1957) 3, 17

MISCELLANEOUS

Board of Water & Power Commissioners of the City of Los Angeles, 1959 Annual Report 70
81 Cong. Rec. 6726 (1937) (Remarks of Congressman Mapes) 58
81 Cong. Rec. 9314 (1937) (Remarks of Senators Connally and Wheeler) 82
83 Cong. Rec. 9101 (1938) (Remarks of Congressman Lea) 83, 99
Dallas Power & Light Company, FPC Form 1 (1959) .. 71
20 F.P.C. Ann. Rep. (1940) 60
26 F.P.C. Ann. Rep. (1946) 64
31 F.P.C. Ann. Rep. (1951) 49, 65
32 F.P.C. Ann. Rep. (1952) 59, 65
33 F.P.C. Ann. Rep. (1953) 59, 65
34 F.P.C. Ann. Rep. (1954) 65
35 F.P.C. Ann. Rep. (1955) 65
36 F.P.C. Ann. Rep. (1956) 65
37 F.P.C. Ann. Rep. (1957) 65
38 F.P.C. Ann. Rep. (1958) 49, 65
39 F.P.C. Ann. Rep. (1959) 65, 95

Page

FPC. Consumption of Fuel for Production of Electric Energy, Electric Power Statistics, 1958 69
FPC, First Five Years Under The Natural Gas Act (1944) 62
FPC, Natural Gas Investigation, Docket No. G-580 ... 64
1960 Gas Facts, American Gas Association 69
Hearing on H.R. 11662, 74th Cong., 2nd Sess. (1936) .. 99
Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., on H.R. 5249 61
House Report No. 960 to accompany H.R. 7476, 86th Cong., 1st Sess. (1959) 96
Houston Lighting & Power Company, FPC Form 1 (1959) 71
Interstate Sanitary Commission (New York-New Jersey Metropolitan Area) February 1958 Report ... 92
New York Times, September 22, 1960, page 26L 43
Pacific Gas & Electric Company, 1959 Report to Stockholders 70
Pacific Lighting Corporation, Annual Report to Shareholders for 1959 70
Presidential Proclamation No. 3279, 24 F.R. 178 (March 12, 1959), as amended by Presidential Proclamation No. 3290, 24 F.R. 3527 (May 2, 1959) 79
Revised Civil Statutes of Texas, Article 7428 87
Senate Document 92, Part 84-A: Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess. (1936) 54, 55, 56, 57, 79, 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 45 and 46

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK, *Respondents*

NATIONAL COAL ASSOCIATION, ET AL., *Petitioners*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK, *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 308-324) is reported at 271 F. 2d 942. The opinion (No. 315-A) and order of the Federal Power Commission denying

the certificate application (R. 174a-183a) and order denying rehearing (R. 184a-194a) are reported at 21 FPC 138 and 399.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1959 (R. 325). By order of Mr. Justice Brennan dated January 27, 1960, the time within which to file a petition for a writ of certiorari was extended to and including March 1, 1960 (R. 327). The petition for writ of certiorari was filed on February 29, 1960, and granted on April 18, 1960, 362 U. S. 948. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In an effort to provide the only practical means of suppressing the acute air pollution problem caused by two of the boilers in its Waterside Station, located near the United Nations Building in the heart of densely populated New York City, Consolidated Edison Company of New York, Inc., (Con Edison), a public utility company distributing electricity, steam and gas in New York City, entered into direct contracts with producers in Texas for a long term firm supply of natural gas. This gas was to be used in these two Waterside boilers for the generation of electricity and steam for ultimate public use. Since the gas was not to be resold, the producers' contracts, including the price for the gas, are not subject to the jurisdiction of the Federal Power Commission (Commission).

Pursuant to arrangements made with Con Edison, Transcontinental Gas Pipe Line Corporation (Transco) applied to the Commission for authority under Sec-

tion 7 of the Natural Gas Act to construct and operate the facilities necessary to transport this gas from Texas to Con Edison's facilities in Manhattan. The Commission found that Transco had met all of the conventional requirements for a certificate and no countervailing considerations were shown on the record. However, the Commission denied the certificate on the basis of its antipathy to the use of natural gas under boilers in steam electric generating stations and four novel so-called "policy considerations" which were not supported by evidence of record but which stemmed from the Commission's aversion to such direct non-jurisdictional sales and their alleged impact on field prices. The Court of Appeals held that the Commission exceeded its jurisdiction under the Natural Gas Act in denying the certificate on the basis of these five policy considerations and, since the conventional requirements had been satisfied, remanded the case to the Commission with directions to issue the certificate. In these circumstances, the questions presented are:

1. Whether the Commission under the circumstances may deny a transportation certificate to the applicant and thereby deny to a distributor-utility the right to purchase gas in the field for its own use on the basis of policy considerations which, in addition to being without factual support, are inconsistent with known industry experience and contrary to the intent of Congress as expressed in the Natural Gas Act, the Air Pollution Control Act of 1955 and the federal antitrust laws.

2. Whether, having found that the Commission exceeded its jurisdiction in denying the certificate on these policy considerations, the Court below properly remanded the case to the Commission with directions to issue the certificate.

STATEMENT

This case involves an order of the Federal Power Commission, issued January 30, 1959 (R. 174a) which denied the application of Transco for a certificate of public convenience and necessity authorizing construction and operation of facilities for rendering a combined gas transportation and peaking service to Con Edison.

The proposal to serve Con Edison which, because of the designation given to the applicable rate schedule, is known as the "X-20 service," was part of Transco's 1958 construction program and as such represented only a portion of Transco's applications in FPC Docket G-13590, *et al.*, involving a total expansion of Transco's facilities and service at an estimated cost of $167,000,000.

The X-20 service is *sui generis*. It was designed to meet a unique situation. It represents the only feasible solution to a serious air pollution problem caused by Con Edison's Waterside Electric Generating Station on Manhattan Island in the heart of New York City. At the same time, this service assures Con Edison of sufficient additional gas to supply the growing needs of its gas consumers adequately and economically during the winter season and during emergency periods of maximum use.

The Waterside Station plays an essential role in the supply of heat and electricity in midtown Manhattan. It provides steam as well as electric service. Indeed, Con Edison's total steam business is roughly equivalent to the whole of its gas residential heating service and the Waterside Station supplies approximately 50% of this steam service (R. 15a). Buildings which are supplied by Waterside's steam would, in the absence

of that source of energy, be obliged to utilize gas or some other fuel under numerous individual boilers located in separate buildings.

The location of the Waterside Station is at the root of the air pollution problem (R. 41a-42a). It is adjacent to the United Nations Building, and surrounded by scores of tall buildings, including the Tudor City Apartments (R. 42a). This proximity to large buildings limits the amount of facilities which Con Edison can add to the plant. Despite the expenditure of $3,600,000 for the installation of the most modern dust collecting equipment in this station, its coal burning boilers Nos. 71 and 72 cause its stacks to belch forth into the atmosphere approximately 15,000 pounds of flyash and 42,000 pounds of sulphur dioxide each day (R. 41a-42a). The effect of these emissions upon the health and comfort of the persons working and living in Manhattan has been, and is, a matter of serious concern to the responsible officials of the City of New York and to Con Edison. The use of oil does not provide an adequate solution because, while its use eliminates flyash, the oil of itself is a source of sulphur dioxide (R. 74a).

After careful study and the expenditure of large sums of money, both the City and Con Edison concluded that the only practical solution to the air pollution problems caused by the Waterside Station would be the introduction of a firm supply of natural gas as a fuel in the worst offending boilers (R. 49a, 52a-53a).

As natural gas would be used on a firm basis for a long period of time in the Waterside Station, it was essential that Con Edison obtain a long-term firm supply of natural gas at a price which would not esca-

late over the years (R. 91a, 92a, 99a). Such a firm supply of gas could not be purchased from Transco for two reasons. First, as Transco must add additional gas supplies from time to time to its system and as its older low-priced reserves are diminished, its average system cost of gas and consequently its rates tend to rise. Second, Transco has the right under its applicable wholesale tariff to interrupt sales of gas as boiler fuel in electric generating stations when such gas supplies are required for storage (R. 30a). While this second eventuality has never occurred on Transco's system in the past, the first (rising cost of gas) has occurred.

To obviate these defects, Con Edison went to the producers of natural gas in Texas and negotiated contracts for the direct purchase of gas in the field (R. 165a). The producers entered into long-term contracts with Con Edison at a fixed price which is not subject to escalation. However, as a condition of this sale the producers required that Con Edison should restrict consumption to Con Edison's own plants (R. 4a). Thus the sales, since they are not sales for resale, are not subject to the jurisdiction of the Federal Power Commission.

The gas supplies contracted for by Con Edison are located in fields in areas where Transco cannot, because of favored nations clauses in its own contracts, any longer purchase gas itself.[1]

---

[1] "Q. Let me ask you this: Did you attempt to purchase any gas for this project in the areas in Texas where Consolidated Edison has entered into its gas purchase contracts?

"A. (Stanwood, Transco's gas supply Vice President) No; for two reasons: First, there was not sufficient gas available that would satisfy our incremental needs in this docket. Secondly, had we done so we would have triggered the favored nations clauses in the con-

As the gas purchased by Con Edison from the producers could not be used by Con Edison to supply the needs of its gas customers during the winter season when their needs were greatest, Transco agreed as part of the transportation service to supply from Transco's own reserves for the equivalent of 60 days each year, gas which Con Edison could resell (R. 5a). During the time of such wholesales by Transco, the transportation gas would be interrupted. Con Edison alone decides when it is to receive transportation gas or resale gas. Thus the X-20 service constitutes a very valuable combined transportation and winter peaking service (R. 6a).

As part of its application in FPC Docket No. G-13590, Transco proposed to construct and operate transmission facilities which would increase the capacity of its transmission system sufficiently to permit it to haul and deliver to Con Edison the 50,000 Mcf per day X-20 service without impairment of service to other customers. The estimated cost of these facilities is $20,000,000 (R. 54a-58a).

To summarize, the proposed X-20 service was designed to benefit Con Edison, its electric and gas customers, and the general public of New York City in three important respects:

(1) It would suppress the air pollution problem caused by Waterside Station, a matter of widespread public benefit.

---

tracts in Districts 2 and 4 in Texas, which would have cost our customers approximately $15 million a year. And that would be based on a price that is now obsolete, the figure I am quoting. Actually it would be more than that if we went down and competed with today's prices. This was based on a study which we made a couple of years ago." (Tr. 606-607)

(2) It would supply economically a reliable supplemental source of natural gas to assist Con Edison in providing adequate service to its gas customers during cold weather and during emergencies.

(3) The use of gas at Waterside as a fuel would provide substantial capital and operating savings which would benefit Con Edison's steam and electric customers.

Extensive evidence was presented by Transco, Con Edison and the City of New York in support of the X-20 service (R. 4a-58a, 72a-152a, 159a-163a). *No evidence whatsoever was presented by the Commission Staff, by the Coal Interests (appearing here as Petitioners in No. 46) or by any other party in opposition to the proposed X-20 service.*

The evidence presented by Con Edison showed that there was an adequate supply of gas under contract in Texas to support the proposed service (R. 166a), that the growth of Con Edison's gas load made additional supplies of gas for winter peaks and for emergencies an absolute necessity (R. 28a-29a, 145a), that the suppression of air pollution conditions at Waterside could only be feasibly effected through utilization of a firm supply of natural gas (R. 50a), and that the use of gas at Waterside would effect substantial capital and operating savings (R. 33a-34a).

The Director of the Department of Air Pollution Control was presented as a witness by Counsel for the City of New York. Dr. Leonard Greenburg, a renowned authority on public health and air pollution, testified that the air pollution occasioned by the Waterside Station was a threat to the health and comfort of those working and residing in Manhattan, as well as an economic detriment for which the only practical

remedy was the utilization of natural gas as a fuel (R. 41a-54a).

Witnesses for Transco showed that there was an adequate supply of gas to provide the peaking service, that the facilities required to transport any gas from its sources of supply to Manhattan Island were adequate (R. 55a), that the service was economically feasible and financeable, that the rates charged for the X-20 service were fully compensatory and non-discriminatory (R. 5a, 123a), and that the construction of the additional capacity and the rendition of the proposed service would not only have no adverse effect upon Transco's ability to serve its existing customers, but would indeed be beneficial to them (R. 123a).

The Presiding Examiner in a decision issued July 9, 1958 determined that a certificate of convenience and necessity authorizing the X-20 service should be issued to Transco (R. 164a-173a). He found that there would be no adverse effect by reason of the proposed service upon any of Transco's regulated activities and held that as a matter of law the Commission had no jurisdiction and no power to consider the use to which Con Edison would put the gas after completion of its transportation from Texas to Manhattan Island (R. 171a). The Presiding Examiner did, however, note that if the Commission had jurisdiction over the end use of the gas Transco had not demonstrated a superior use for the gas (R. 171a-172a).

On January 30, 1959, the Commission issued its order reversing the Initial Decision of the Presiding Examiner insofar as it related to the X-20 service and denied Transco's application for a certificate to render that service (R. 174a-183a).

In its order the Commission found that with one insignificant exception, which need not be considered,[1] the "conventional requirements of public convenience and necessity" set forth in Section 7 of the Natural Gas Act had been met (R. 178a). Offsetting this, however, the Commission introduced five so-called "policy considerations," the first four of which are completely novel. These five "policy considerations," stated in the Commission's language, are as follows:

> (1) Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests (R. 178a).
>
> (2) The authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs (R. 178a).
>
> (3) The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields (R. 179a).
>
> (4) Large purchasers of gas, like Consolidated Edison can readily compete with pipelines for gas purchases. . . . But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the pipeline can continue to buy in competition with *nonjurisdictional,* large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question (R. 179a).[2]

---

[1] See footnote 1, *infra*, page 20.

[2] Italics supplied throughout this brief, unless otherwise noted.

> (5) These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling significance (R. 179a).

The late Commissioner Hussey, formerly Conservation Commissioner of the State of Louisiana,[1] dissented on the grounds that Transco had met all of the usual factors for determining public convenience and necessity, that the Commission had granted certificates for the use of boiler fuel in a number of cases in the past, that the proposed service was far more compensatory than most of those previously authorized and just as justifiable, and that the majority opinion went beyond the record and some of its conclusions were not sustained by the evidence (R. 215-217).

Transco, Con Edison and the City of New York appealed to the United States Court of Appeals for the Third Circuit which decided unanimously that the Commission had gone beyond its authority in denying Transco its certificate.

> We think that what the Commission has in effect done is to assert, by its examination and disapproval of the end use to be made of this gas, a general allocation and conservation authority over the natural gas fields of the United States (R. 312, 271 F. 2d at 946).

---

[1] The legislature of Louisiana delegates to a single Conservation Commissioner the authority to regulate conservation of oil and gas in that State. Commissioner Hussey's experience gave him an extraordinary degree of expertise in this area.

The Court of Appeals concluded that the Commission's action was supported neither by the Act, the legislative history, nor the evidence of record.

As a part of the statement of this case, it is of importance to give a brief picture of the trial record.

The record consists essentially of two parts. One part is devoted to the showing in respect of the conventional or orthodox requirements, to wit, gas supply, engineering and economic feasibility, financeability and market for the gas. The remainder of the record, with the exception of the explanation of the 60-day use gas, was devoted to the problem of air pollution control through the use of the transportation gas.

As stated above, neither the Staff nor any intervenor put on the record any evidence whatsoever.

Aside from the issues in respect to the conventional requirements, the single issue *on the record* was that of the use to be made of the transportation gas by Con Edison, sometimes referred to as "end use." Not in any manner were any of the four "policy considerations" (which the Commission coupled with "inferior use" to deny the certificate) even suggested as issues or possible issues. The record thus closed.

Several weeks later, for the first time, Transco and Con Edison were confronted with the four novel policy considerations. This confrontation occurred for the first time in the briefs of Staff and Coal intervenors. These policy arguments of the Staff and Coal intervenors (R. 176a-177a) were merely paraphrased by the Commission (R. 178a-179a) and became the Commission's policy considerations upon which it denied the certificate.

Thus, neither Transco nor Con Edison had any notice whatsoever of the four novel policy considerations prior to the close of the record. As we shall show in our discussion below,[1] not only are these policy considerations or factors not supported by the evidence of record in this proceeding but they are contrary to that evidence, the past experience of Transco and the general knowledge and experience of the industry.

SUMMARY OF ARGUMENT

I

Transco has met all of the usual requirements for the issuance of a certificate of public convenience and necessity authorizing the proposed X-20 transportation service. It has shown that Con Edison has contracted for an adequate supply of gas, that Con Edison requires the firm suppy of gas, that the facilities to be constructed are only those reasonably required and adequate to render the service, and that they can be financed. Further, Transco has shown that the transportation service will be economically feasible and that this service will neither impair service to Transco's other customers nor put any economic burden on them, and that it will not create a preference or discrimination forbidden by the Natural Gas Act.

These are the usual components constituting proof of public convenience and necessity. In this case, the Commission found that Transco had satisfied these elements. Having reached that conclusion the Commission's permissible range of inquiry on this record was ended and it should have issued the certificate applied for, under the command of Section 7(e) of the Natural Gas Act.

---

[1] See Part II, *infra*.

II

The Commission based its denial of the certificate applied for by Transco on five so-called "policy considerations."

Three of these considerations represent essentially an attempt to reduce the number of natural gas purchasers in the field and thereby to compel, as much as possible, the sale of natural gas in interstate commerce by producers under sales for resale contracts which sales the Commission can regulate. These considerations attempt to read out or nullify limitations on the Commission's jurisdiction over natural gas producers, which the Congress has deliberately provided in the Natural Gas Act.

One of these policy considerations implies that, after the approval of the X-20 service, Transco will not continue as diligently as in the past to meet the natural gas requirements of its smaller customers. This consideration is contrary to all past experience on the Transco system and events subsequent to this proposal refute the Commission's alleged fears. Furthermore, no customer of Transco opposed the transportation project for any reason.

Finally, one consideration represents a direct attempt to assert a general conservation jurisdiction by the Commission. This consideration is bottomed on the Commission's antipathy toward use of natural gas as boiler fuel. Congress has repeatedly been importuned by the Commission to give it control over the "end use" of gas, and to date these requests have not resulted in amendments to the Natural Gas Act to accomplish the purpose which the Commission has accomplished by its denial of Transco's certificate here.

Each of the five denial factors or considerations, to some extent requires factual assumptions which cannot be supported by the evidence in the instant record. All of the evidence of record with respect to the proposed X-20 service was presented by Transco and those supporting the proposal. Moreover, the denial factors are refuted by the general experience in the industry. Thus, even to the permissible extent that the Commission might lean on "expertise" to fill in the factual void for its policy considerations; there is no valid basis for them.

However, the Commission reads these five "policy considerations" into the content of the standard of public convenience and necessity and, on the basis of these considerations which it deemed controlling, it denied the certificate.

The court below correctly decided that these considerations were outside the permissible range of inquiry for the Commission in a certificate case and that they were primarily directed toward the "end-use" of the gas—a conservation jurisdiction outside of the Commission's authority.

III

The Natural Gas Act never envisaged federal regulation of the entire natural gas industry. The Act contains enumerated grants of authority and denials of authority. The factors or "policy considerations" employed by the Commission as the basis for denying a certificate for the X-20 service actually represent an attempt by the Commission to utilize its admitted jurisdiction over the transportation of natural gas in interstate commerce to engross within its authority a control over direct sales to consumers, production and distri-

bution, which Congress specifically denied to the Commission. The Commission may not sweep the prohibitions out of the statute by giving the "public convenience and necessity" standard of the certificate provisions of the Act an excessive definition. Nor may the Commission expand its limited jurisdiction by vesting itself with a conservation authority over natural gas supplies through a consideration of the end use to which the gas will be put by a non-jurisdictional consumer. The Federal Trade Commission viewed the conservation problem in terms of physical waste, a local problem for state resolution. Congress refused to give the Federal Power Commission conservation authority in the 1938 Act and in the 1942 certificate amendment. Despite subsequent urgings to give it conservation authority, Congress has declined to amend the Act to accomplish such a purpose.

By denying to Con Edison, a public utility, an opportunity of access to natural gas supplies required for the health and comfort of the residents of New York City, which relief persons in other states have heretofore enjoyed, the Commission has acted contrary to the intent of Congress expressed in the non-discrimination provisions of the Act.

IV

Congress has made plain in the Natural Gas Act that it intended that the interstate natural gas pipeline companies be allowed a large degree of freedom in competing with other fuels to serve industry. Pipeline companies may change their rates applicable to industrial business as quickly as competition requires, and their contracts permit. The Commission may not stifle competition by pricing gas out of the market, because

it is forbidden to raise rates to a level higher than that filed by the pipeline company.

Congress has stated a national interest in the attainment of a competitive order in the economy by enacting the antitrust laws.[1] By forbidding Transco to compete with present suppliers in serving on a firm basis the fuel requirements of steam electric generating stations, the Commission has improperly suppressed competition without legislative sanction for its action.

V.

Recognizing the dangers inherent in urban air pollution, Congress has authorized the Secretary of Health, Education and Welfare and the Surgeon General to undertake a $5,000,000 per annum program of research and cooperation with state and municipal authorities and industries designed to eliminate or reduce urban air pollution. The City of New York, through its Department of Air Pollution Control, has for several years been pressuring Con Edison to suppress the air pollution caused by flyash and sulphur dioxide discharges from Con Edison's steam electric generating stations. After Con Edison had expended millions of dollars in such efforts, the municipal authorities concluded that the only practical way of making further progress at Waterside Station is to use natural gas on a firm basis as a fuel in two of the boilers in the station. By denying the X-20 service, the Commission has deprived Con Edison of the natural gas supplies it needs for this suppression of air pollution, saddled the residents of New York City with a continuation of the sulphur dioxide problem and improperly thwarted the expressed intent of Congress.

---

[1] Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7, 15 (1952) (Supp. IV, 1957); Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1952) (Supp. IV, 1957).

VI

The Coal Intervenors seek the recognition of a general conservation authority in the Commission through control of "end use" which will eliminate natural gas from the growing market for fuel in steam electric generating stations. This goal of monopoly, not competition, is contrary to the intent of Congress expressed in the Natural Gas Act.

The giant California companies appearing as *amici* are interested in maintaining the industries in their service areas as captive customers who may not seek sources of natural gas supply which will offer competitive advantages to the industrial consumer over the service offered by these *amici*.

VII

The Court of Appeals properly remanded with instructions to issue a certificate for the X-20 service, subject to further hearing on a minor question of rates which the Commission admits is no grounds for denying the certificate (R. 309). Transco has in later proceedings before the Commission preserved its ability to render the X-20 service through the facilities associated with that service in FPC Docket No. G-13590. The Commission has assisted Transco in this effort by reserving decision on the balance of facilities required in a later proceeding *to provide the service proposed in that proceeding* in the event the X-20 service and facilities are ultimately authorized in Docket No. G-13590. See *Transcontinental Gas Pipe Line Corporation*, 22 F.P.C. 836, 840 (1959).

There is no further issue to be resolved on the record in these proceedings. The Commission having made all of the requisite findings of public convenience and

necessity, the court below properly issued a remand order which would avoid any further delay in this air pollution suppression program.

ARGUMENT

I

TRANSCO HAVING MET THE STANDARDS OF SECTION 7(e) OF THE NATURAL GAS ACT, THE COMMISSION IS REQUIRED TO ISSUE TO IT THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY APPLIED FOR.

Section 7(e) of the Natural Gas Act provides in pertinent part as follows:

> * * * a certificate *shall be issued* to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; * * *

The evidence of record shows that the gas supply, facilities, market and rates associated with the X-20 service met all of the proper standards of Section 7(e) of the Natural Gas Act. The Commission acknowledged as much when it found (R. 178a):

> Militating in favor of the X-20 service is the fact that most of the conventional requirements of public convenience and necessity—matters of mar-

kets, facilities, gas supply, and to a substantial extent, rates[3]—are satisfied.

[3] The rate for the transportation of the "displaced" gas has not been substantiated on the record, however.[1]

The above quoted determination is completely corroborated in the dissenting opinion of Commissioner Hussey, wherein he states (R. 215):

> All of the factors usually considered in determining public convenience and necessity have been satisfied in this case. There is an adequate supply of gas for the service, there is a firm demand and market for the gas, the facilities proposed are adequate, the project is economically feasible, the rate is fully compensatory, the additional services will improve the load factor of Transco's pipeline, and will make available additional volumes of gas for peaking loads.

The record proof establishes fully all of the conclusions stated by Commissioner Hussey. Nowhere

[1] The observation of the Commission in its footnote 3 is quite contrary to the record (R. 72a). The "displaced" gas phase of the Transco proposal is *de minimis*. The record indicates that there will rarely, if ever, be any transportation of "displaced" gas. In any event the Commission in no wise relies upon its footnote observation as any basis for denial of the certificate as is evidenced by the following partial quotation from footnote 10 on page 5 of its brief before the lower court:

> While both the Commission and the examiner found a failure to substantiate the rate for transportation of "displaced" gas, we here note our agreement with Transco (Br. 12, fn. 1) that the Commission did not rely upon that deficiency as a ground for denying the certificate. Had the Commission otherwise been able to grant the certificate, it would presumably have remedied the defect by a condition. • • • Accordingly, we feel the Court need not here consider, and so do not brief the question.

throughout its opinion does the majority contradict this assertion.

Furthermore, Transco's proof established that the rendition of the X-20 service would in no wise adversely affect any of Transco's customers, either in the matter of service or the matter of rates. This fact was specifically found by the Examiner (R. 171a):

> Consideration must be given to pipeline capacity, and consideration must be given to the charge or rate to be made for this service. The Commission, however, has no legal basis for inquiry into the merits of the proposed end use so long as that use has no relationship or effect upon consumer service stemming from jurisdictional gas.
>
> For this reason, *the finding which is here made, that there is no evidence of any prospective adverse effect by reason of this proposed transportation service on any of Transco's regulated activities* ends the inquiry and it must, therefore be approved in principle.

The Commission in no wise attempted to alter the Examiner's finding that:

> * * * there is *no* evidence of any prospective adverse effect by reason of this proposed transportation service on any of Transco's regulated activities * * *.

The record clearly would admit of no alteration of this finding.

It is significant that in a proceeding in which all of Transco's large customers and the Public Service Commission of the State of New York participated no claim was ever made either that the X-20 service would impair Transco's ability to serve its existing customers

or that the X-20 service was discriminatory or preferential.

We therefore assert that with respect to the transportation service involved in this case, Transco having shown that:

(a) there is an adequate supply of gas for the service;
(b) the facilities proposed are adequate;
(c) there is a firm demand and market for the gas;
(d) the project is economically feasible;
(e) the rate is proper; and
(f) that the proposed service will in no wise adversely affect any of applicant's other customers

the Commission's legally permissible range of inquiry on this record is at an end and the "certificate shall be issued" to the applicant.

It is to be stressed that throughout its entire opinion denying the certificate (R. 174a-183a), in reciting its reasons for denial of the certificate, the Commission paid virtually no heed to the facts in the instant record. Its "denial-factors" or "policy considerations" were mere conjectural generalizations or speculations as to pitfalls which might possibly some day beset the industry generally.

We wholeheartedly agree with the Examiner (R. 171a):

> The possibility that other distributors may follow Consolidated Edison's example and seek to make similar arrangements has nothing whatever to do with this case. * * *

But Transco has gone much further than meeting the standards listed as (a) through (f) above (*supra*,

p. 22). Through the evidence furnished by Con Edison and the City of New York, it was elaborately demonstrated that the X-20 gas will be used for highly superior purposes. The gas will not be used for typical "industrial use" as the Commission brief struggles *ad infinitum* to maintain, in its effort to asperse the use of the gas as "inferior." As we will show more fully hereafter (*infra*, Part V), the gas will be used for public utility purposes by converting its energy into steam for heating a large number of buildings and into electricity for general purpose use. What is even more important, the gas will serve as the only feasible means of suppressing the dangerous air pollution conditions caused by this Waterside Station which plague New York City.

II

THE COMMISSION'S DENIAL-FACTORS OR "POLICY CONSIDERATIONS" ARE WITHOUT FOUNDATION IN THE RECORD, ARE WITHOUT RATIONAL BASIS EITHER WITHIN OR WITHOUT THE RECORD AND ARE COMPLETELY IN THE REALM OF THE CHIMERICAL.

Having determined, by all of the "large print" criteria that Transco is entitled to the certificate as applied for to render the X-20 service, the Commission proceeds by the small print route to deprive Transco of its right to the certificate.

By way of reminder at this point we reiterate that the only evidence in this record, in reference to the X-20 service, is that introduced by Transco, Con Edison and the City of New York; neither the Commission's Staff nor opposing intervenors introduced an iota of testimony or evidence. Furthermore, the Staff in no wise stated its position either in favor of or in opposition to the grant of the X-20 certificate at any time

until the record was closed. The first time that Transco knew anything of the Staff's position was when it was served with the Staff's brief. The Coal intervenors, however, made it clear on the record that they were opposed to the grant of the X-20 service for the reason that the use of natural gas as proposed by Con Edison would displace coal. Thus the only issue spread upon the record was of so-called "end-use" of the gas. In this state of the record Transco could not possibly have anticipated or even dreamed of the "factors" or "policy considerations" which the Commission came up with in its Opinion 315-A. This lack of notice of Staff position or possible Commission position is hardly in accord with due process and falls far short of being "cricket."

By way of introduction to discussion individually of the denial-bases there should be vividly kept in mind the fundamental proposition that any case, whether in a court or before an administrative agency, *must* be decided *upon the record.* The hornbook elements of due process, reasonableness and fair play, demand that this be so. The Commission is not permitted under the law to determine valuable and important property rights of parties before it, on the basis of roving speculation as to possible unrelated future events, or chimeras, nowhere even intimated, let alone having substantial support, in the record or even in rational conjecture outside the record. The propositions which we assert have their roots in the decided cases, of which a milestone example is *United States* v. *Abilene & Southern Railway Co.*, 265 U.S. 274 (1924). In that case, the Interstate Commerce Commission was not even permitted to resort to material in annual reports filed with it by carriers subject to its jurisdiction, without making the same a part of the record, as is made

clear by the following brief excerpt from that opinion (page 288):

> The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; *Spiller* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 253 U.S. 117, 131. Compare *Bilokumsky* v. *Tod*, 263 U.S. 149, 157. *But a finding without evidence is beyond the power of the Commission.* Papers in the Commission's files are not always evidence in a case. *New England Division's Case*, 261 U.S. 184, 198, note 19. *Nothing can be treated as evidence which is not introduced as such. Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91, 93; *Chicago Junction Case*, 264 U.S. 258.
>
> * * * * *
>
> (page 290): The general notice that the Commission would rely upon voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

Furthermore, it is submitted, bald policy conclusions must be supported by adequate subsidiary findings based upon the record. This is made clear by the following excerpt from *Colorado-Wyoming Gas Co.* v. *Federal Power Commission, et al.*, 324 U.S. 626, 634 (1945):

> The review which Congress has provided for these rate orders is limited. Section 19(b), 15 U.S.C.A. § 717r(b) says that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." But we

> must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. * * * [Citations] * * * Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19(b). The Courts cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under § 19(b) to make findings and substitute them for those of the Commission.

See also *South Carolina Generating Company* v. *Federal Power Commission*, 249 F. 2d 755, 764 (4th Cir. 1957); *cert. denied*, 356 U.S. 912 (1958).

In an obvious attempt to avoid the requirements of the law as indicated in the cited cases, the Commission refrained from making any *findings* as bases for the certificate denial. Instead it resorted to the device of denominating its denial-bases as "policy considerations." Each of the denial-bases to a greater or lesser degree, involve important matters of fact. The stratagem of submerging necessary fact considerations in the foggy cloud of alleged or assumed expertise does not comport with either the "mood" or the letter requirements of the Administrative Procedure Act.[1] *Universal Camera Corp.* v. *National Labor Rel. Board*, 340 U.S. 474 (1951). With these fundamentals as a base, we launch upon our discussion of the five "factors" or "policy considerations" upon which the Commission seeks to predicate its denial of the certificate.

---

[1] 5 U.S.C. §§ 1001-1011.

(1) The first of the bases of denial is as follows (R. 178a):

> Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests.

We will assume first that the quoted statement has reference to a service similar to the proposed X-20 service, that is one involving a public utility use of the gas and is necessary to suppress serious air pollution conditions. We will later discuss the quite distinguishable typical or ordinary "industrial use."

There is no evidence in the instant record to support the utterly speculative proposition that the granting of Transco's request would soon confront the Commission with many requests of the same general character. As was demonstrated in the testimony of Dr. Greenburg (see Appendix B, *infra*) the uses to which the X-20 service will be put are virtually unique. There are very few cities in the United States, in respect to which a showing of convenience and necessity, similar to that made upon this record in respect to the City of New York can possibly be made. The public nuisance to be alleviated by the use of the gas in this case occurs in an area of the densest population in the world; it occurs on a constricted island where the opportunities for the elimination of that public nuisance are virtually impossible. The steam produced by the gas serves not only to generate electricity, but also serves in substantial part to heat approximately 2800 large buildings in New York, which absent this steam would be required to have individual heating plants; and the capital

investment savings and the annual operating savings through the proposed use of gas are huge in dollar amount.

As we observed above, the Commission is obligated as a matter of law to decide the instant case upon the instant record. If, when, and as some other application is filed in some other case, having objectives similar to those sought to be accomplished here, it will be time enough to decide that case on the record. Suffice it to say here that the Commission should not have been frightened into killing the instant project by conjuring up specters which may be thought to hover in some other setting.

Even if it be assumed for the purposes of argument that the X-20 service would be followed by applications by distribution companies serving metropolitan areas in other parts of the country attempting to combat air pollution, there is nowhere in the Natural Gas Act, nor in its legislative history, nor in any other applicable declaration of Congressional purpose any suggestion that the Commission may deny a certificate on the "factor" or "policy consideration" that the grant of relief to that applicant must necessarily be followed by the grant of similar relief to other applicants.

The validity of the foregoing contentions seems to be confirmed in the very language of the Commission itself in its order denying the application for rehearing in the instant case wherein it states (R. 186a):

> Accordingly, we must interpret the standard of "public convenience and necessity" in the light of the facts of each case, giving it a scope consistent with the broad purpose of the organic statute and applying it in pursuance of the policies the Act is intended to serve.

However, the Court will look in vain for any more specific reference to the "broad purpose of the organic statute" or "policies the Act is intended to serve."

The Commission itself has very sharply, in the past, recognized its legal obligation to decide a given case on a given record. *In the Matters of Tennessee Gas Transmission Company, et al.*, 12 F.P.C. 311, 313-314 (1953), the Commission delineated correctly its proper legal bounds:

> We recognize that there is a large unsatisfied market for natural gas in Canada, but we wish to make it plain beyond all peradventure of doubt that, in authorizing the exportation to Canada herein sought by Tennessee and Niagara we are not undertaking to supply any market or any area beyond the volumes *for which authorization is granted herein*. If, in the future, application is made for authorization to export additional volumes of natural gas to Canada, whether for use in the areas presently proposed to be served *through Niagara's facilities or through the facilities of other companies in other areas*, we will consider *that* application at *that* time upon *its* merits, and the grant of this authorization under the peculiar circumstances here present obviously cannot be considered as creating a precedent for guidance *in the future in other situations*.

The Commission implies that there is a very large market for transportation service where the consumer would contract with the producer and arrange for the transportation of the gas supply in interstate commerce to the point of consumption and that approval of the X-20 service would cause a vast number of these potential consumers to appear in the field and to bid up the price of gas. This argument is contrary to the past experience of the industry and present trends in

gas purchase costs indicate that there is very little likelihood of the development of such a market in the future.

An examination of the Commission's past orders will show that the Commission has since 1942 been presented with only two important cases where *consumers* contracted with producers in the field and arranged for the transportation of gas in interstate commerce. In one case, that of the Houston-Coastal project,[1] the Commission authorized the transportation service, although the gas supply in question was to be used as boiler fuel in steam electric generating stations in Florida. In the other case,[2] which involved the proposed transportation of gas by Transco for Virginia Electric and Power Company, the project was abandoned after a denial by the Commission because it could not be demonstrated to be economic.

This Court has noted in its *Catco* decision, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959), that the price level for new supplies of natural gas in the south Louisiana area has risen sharply over the past few years. Cost is one of the most important factors in the utilization of fuel by industry. It is thus apparent that with the price of gas rising in the field and in view of the few experiences of direct purchasers in the past, there is little likelihood that industries today would repeat these few performances.

---

[1] *Houston Texas Gas & Oil Corp., et al.*, 16 F.P.C. 118; affirmed. *sub nomine, Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 958 (1958).

[2] *Transcontinental Gas Pipe Line Corporation, et al.*, 20 F.P.C. 843 (1958).

One example of the present difficulty of selling gas to industry appears in the Commission's recent decision authorizing the construction of a new pipeline to serve Chicago. In his dissent in *Midwestern Gas Transmission Company*, 21 F.P.C. 653, 668-673 (1959), Commissioner Kline objected to the establishment of rate levels in Midwestern's tariff which permitted it to sell gas to its customers under the commodity portion of its rate at a level lower than Midwestern paid to its supplier, Tennessee Gas Transmission Company. This rate tilt had been deemed necessary in ordr to permit the gas to be resold to industries in the Chicago area.[1]

The effect of this rising gas cost has also deprived Transco of the opportunity to make direct sales to steam electric generating stations for use as boiler fuel. In December of this year (1960), Transco's authorization to sell interruptible gas to the Duke Power Com-

---

[1] "How much more reluctant we should be to permit use of natural gas as boiler fuel when the commodity price at which it is to be sold by the pipeline is below the cost the pipeline will pay its supplier [parent company]!.

"This policy with respect to the use of gas for boiler fuel was still being followed by us as recently as January 30 of this year. In Opinion No. 315-A* this Commission quoted with approval the above statement from the *Mississippi River Fuel Corp. case* in denying an application to permit the sale of natural gas for boiler fuel. In that case, to my mind a borderline case, the sale for boiler fuel purposes was, in effect, interruptible for a period of 60 days, provided substantial benefits to the domestic users and, in addition, the granting of that application would have helped alleviate the soot problem arising from the use of coal as boiler fuel in generating stations in the vicinity of the United Nations Building. Certainly, it had far more merit than the present application. To certificate this project is a complete reversal of our stand in the *Transcontinental case.*" (21 F.P.C. at 670)

(* In the Matters of Transcontinental Gas Pipe Line Corp., *et al.*, Docket Nos. G-13143 *et al.* [the instant case].)

pany for use as boiler fuel expires. Duke Power has advised Transco that it is unable now to justify a renewal of this service for use as boiler fuel and has simply requested an extension of service solely for the purpose of ignition fuel to assist in the burning of coal in the power station where natural gas has heretofore been used.[1]

The insatiable demand for the service sought here by Con Edison which is envisioned in the Commission's brief is utterly unreal and day by day becomes more of a phantom.

(2) We will now discuss the second "factor" or "policy consideration" upon which the Commission attempts to build its basis for the denial of the certificate. It reads as follows (R. 178a):

> Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs, even though the bare authorization here sought would not of itself entirely nullify the Leidy Storage project.

This bald conclusion has no factual support in the record, and is in complete, unmitigated conflict with the record and with the facts. Transco's application in this case proposed to serve every last Mcf of gas desired by any of its existing customers, as well as X-20 service. Furthermore, on the record, Transco undertook to serve all of the gas requested by any intervenor. Of course, the Commission made no subsidiary findings to support the "policy consideration" which we are

---

[1] See Transcontinental Gas Pipe Line Corporation, Docket No. CP61-64, filed September 2, 1960.

now discussing. The simple reason is that the facts of record preclude any such findings.

In its application for rehearing Transco, in addition to pointing out the groundlessness of this policy consideration, called the Commission's attention to the fact that the X-20 service could in no wise pre-empt capacity since the capacity had not been built. The Commission's response in its order denying rehearing was couched in the following language (R. 191a):

> As to the pre-emption of capacity, of course there can be no pre-emption of capacity not already built; but the construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in accordance with the requirements of public convenience and necessity.

The Commission's rehearing statement is as baseless as its initial pre-emption statement.

Transco has, for the past several years, methodically expanded its system to meet the normal growth of the natural gas market which it serves.[1] The X-20 service was part of Transco's 1958 expansion program. At the very time the Commission was writing its opinion and

---

[1] The following table demonstrates the pattern of expansion since 1955:

Program	FPC Docket	FPC Authorization	Authorized Increase In Plant	Increase In Peak Day Service
1955	G-4185	14 FPC 1	$ 48,205,000	92,722 Mcf
1956	G-10000	17 FPC 360	$ 50,858,000	124,644 Mcf
1957	G-12059	18 FPC 710	$ 51,600,000	114,078 Mcf
1958	G-13143	20 FPC 264	$147,000,000	367,515 Mcf
1959	G-16603	22 FPC 836	$ 53,373,000	138,589 Mcf
1960	G-20107	*	$ 52,000,000	114,753 Mcf

* Pending before the Commission.

its order denying rehearing in the instant proceeding, there was on file with the Commission an application for Transco's 1959 expansion program providing for an increase of capacity of 138,589 Mcf. This 138,589 Mcf of expansion was over and above the 50,000 Mcf of X-20 service. Furthermore, on November 12, 1959, an application (Docket No. G-20107) for the 1960 expansion program was filed for a still further expansion of capacity of 114,753 Mcf. The 1958 and 1959 programs covered all requests for resale gas. These facts make the Commission's "pre-emption" statement fantastic.

Transco has strong business incentive to expand its facilities at every reasonable opportunity. Its return is dependent exclusively upon its investment in plant facilities. Every year its rate base is substantially carved away by operation of the depreciation factor which currently runs at the rate of approximately $19,000,000. Unless this rate base attrition is constantly replaced, the investment heads toward the "vanishing rate base." Unless Transco invests these annual depreciation amounts in plant, it would be forced either to take the funds out of the business or invest them in some other enterprise than the natural gas pipeline business.

But merely equating new investment to the attrition in rate base caused by depreciation means that the business enterprise is standing still. Growth is the urge of every dynamic business operation, therefore the incentive in the natural gas pipeline business is to do much more than keep the rate base static. Furthermore, Transco is confronted with very sharp competition from two other major pipeline companies in Transco's major market area. In order to meet this compe-

tition, Transco must fulfill new demands in its service area or lose its market to competitors. Therefore there is a constant incentive to insure "the likelihood of capacity being constructed for other and future service" to meet the requirements of public convenience and necessity. The Commission's "pre-emption" assertion will just not hold water. It must, therefore, be removed from consideration in this case.

(3) We proceed to the third "policy consideration" which the Commission attempts to use as support for its denial of this certificate. It reads as follows (R. 179a):

> The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary.

The implications of this "policy consideration" are striking. What the Commission is saying is that pipeline companies may purchase gas in the producing fields from independent producers but that a distributor-utility may not do so. They say that if a distribution company enters the purchasing group of natural gas buyers in the field, there would be upward pressure on rate levels in the fields.[1]

---

[1] Actually, the price which Con Edison has agreed to pay the Texas producers is the price "required to bring this gas to the interstate market instead of being sold for intrastate uses." *Trunkline Gas Company, et al.*, 21 F.P.C. 704, 718 (1959).

Let us examine the sense or rationale of this statement. Carried to its logical conclusion, the optimum situation, in respect to gas purchases in the field, would obtain if there were "only one bidder." Presumably, the Commission thinking is that it is unfortunate that there are as many pipeline company bidders as there are. At any rate, it seems clear from a reading of the instant "policy consideration" and the next which follows (*infra*, p. 39), that the Commission is determined that the bidders shall be rigorously confined to the pipeline companies and that in no event shall a distribution company be added to their number.

This action by the Commission to limit the number of purchasers in the field represents a reversal of a trend away from the evils of monopoly which the Federal Trade Commission recognized in its famous report to the United States Senate which served as a basis for the Natural Gas Act.[1] (Section 1(a) of the Natural Gas Act)

The plain fact is that pressure on prices in the field is asserted by the totality of demand existing for natural gas in the whole United States. Just who the messenger or instrumentality is which carries that demand to the market place in the field is utterly immaterial. All of the natural gas pipeline companies in America are active bidders in the producing areas. The overwhelming portion of the gas which the pipelines buy from the producers is for resale to distribution companies such as Con Edison, which distributing companies buy the gas (a) for resale to domestic and commercial customers, (b) for resale to industrial customers who frequently burn the gas under boilers and (c) for use by the distributing companies themselves

[1] See III B, *infra*.

in their electric departments. Thus the end result, as far as field price pressures are concerned, is precisely the same whether the purchaser is a pipeline company or the distributor-utility. The necessary meaning of the above quoted "policy consideration" of the Commission is that pipeline companies may bid against each other for supplies of gas irrespective of the resultant impact on prices of gas in the field, but distributing companies are to be precluded from becoming bidders and this preclusion is to be effectuated by the Commission under the guise of regulating transportation.

This novel approach of the Commission is puzzling in light of the Commission's historical approach. Until the present case, the Commission's policy was that evidenced *In the Matter of Michigan-Wisconsin Pipe Line Company*, 6 F.P.C. 1 (1947), where, at page 34, the Commission said:

> The distribution company, Michigan Consolidated, furnishing gas to the ultimate consumers is part of the public whose convenience and necessity we have to consider in making a decision on this application. * * * Distinguishing between Michigan Consolidated's own interest and the ultimate consumer's interest, *there is nothing unusual or objectionable in the distributing company's effort to assure itself, in the best manner possible of a long-term natural gas supply at a low cost and under favorable conditions.* It is also understandable that this large distribution company should desire to control, if not directly own and operate a long-distance transmission line from the source of supply in the Hugoton Field to the point of distribution in Michigan.
>
> In this respect there is a close analogy between the supply arrangements proposed between Michigan Consolidated and Michigan-Wisconsin, and

the arrangements existing with respect to the supply of gas to many other important sections of the country.[18]

[18] For example, the Peoples Gas Light & Coke Company which serves Chicago, Illinois, and controls Chicago District Pipeline Company, its immediate supplier, and has a substantial interest in Natural Gas Pipeline Company of America and Texoma Natural Gas Company. United Gas Corporation controls United Gas Pipe Line Company and Union Producing Company, the latter supplying in part the requirements of United Gas Pipe Line Company which company in turn supplies gas to United Gas Corporation. Lone Star Gas Company which furnishes natural gas to many communities in Texas and Oklahoma and operates its own extensive transmission system, receives a large portion of its gas supply from Lone Star Producing Company. Cities Service Gas Company, which operates an extensive pipeline network, is the source of supply to its affiliated distribution companies, Kansas City Gas Company, Wyandotte County Gas Company and Gas Service Company. *Southern California Gas Company and Southern Counties Gas Company* [who have filed a brief *amicus* in this case in support of the Commission], *which distribute gas in a large area of Southern California, operate numerous pipelines extending to producing fields and also purchase a considerable portion of their gas supply in their distribution territory from their parent company, Pacific Lighting Corporation, which transports such gas from the gas producing fields of California.* Southern Natural Gas Company which operates an extensive transmission system is the sole source of gas supply to a number of affiliated distributing companies in Mississippi and Alabama. In the Appalachian area the common practice is to have production, transmission and distribution operations integrated through common financial control as in the case of Columbia Gas & Electric system, Consolidated Natural Gas Company system, Standard Gas & Electric Company system and National Fuel Gas Company system.

Considering this historical situation, which continued up to the very time of this case, it becomes sharply obvious that what the Commission is really seeking to accomplish is the prohibition of direct or non-juris-

dictional purchases in the field. Of course, the acutely focused desire of the Commission places it in a logical dilemma in view of the fact that Congress in Section 1(b) expressly prohibits the Commission from any regulation of direct sales in the field, let alone the extreme regulation of complete prohibition. More will be said under Part III, *infra*, in reference to the Commission's lack of jurisdiction so to do, even under the guise of regulating "transportation."

The basic concern, expressed in this third "policy consideration" is that presumably "there would be upward pressure on rate levels in the field" by reason of the direct non-jurisdictional purchases. Obviously, the Commission is talking about pressures on the prices of gas sold by the producers to the pipelines for resale. The short answer to this contention is that any sale made by a producer for resale for ultimate public consumption is completely subject to Commission regulation under Sections 4, 5 and 7 of the Natural Gas Act. Such a seller may not charge any price which the traffic will bear, irrespective of any kind of pressures. He must justify that price under standards applicable under the Act.[1]

(4) The Commission's next purported "policy consideration" upon which it seeks to support its denial of a certificate herein is as follows (R. 179a):

> Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the pipeline can continue to buy in competition with *nonjurisdic-*

[1] *Atlantic Refining Co. v. Public Service Commission*, 360 U.S 378 (1959).

> *tional,* large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question.

There is nothing whatsoever in the Natural Gas Act to indicate that Congress intended that pipeline companies as distinguished from distributor utility companies should, as a select group, have a monopoly on gas purchases in the field. On the contrary, Congress gave clear indication in the Act itself that the entire statute should be so administered as to avoid monopolistic situations, eschewed by the antitrust laws. Section 20(a) of the Act [15 U.S.C. § 717s(a)] is in point:

> The Commission may transmit such evidence as may be available * * * concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

Certainly, this thinking of Congress which has to be read into the concept of "public convenience and necessity" in Section 7, cannot be construed to countenance any such contravention of the intent of the antitrust laws, as is implicitly blessed by the above "policy consideration" of the Commission. More will be said on this subject under Part III, *infra.*

Apparently, the Commission reconciles its untenable position on some theory that it is thereby protecting the small customer of the interstate pipeline. The Commission observes (R. 179a):

> But the smaller purchaser may not be as fortunate [as a large purchaser] like Con Edison. He will have to rely on the pipeline supplier.

Just what the basis is, either in the record or outside the record, that the small purchaser may thus be un-

fortunate is impossible to ascertain. The Commission, of course, points to no instances whatsoever to support its statement. The consideration is fabricated out of thin air.

There are several small customers, both private and municipal, on Transco's system. Every one of them is receiving every last Mcf of gas it has expressed a desire to receive and at rates fixed by the Federal Power Commission. This is precisely what Congress intended, namely, *adequate service at reasonable rates* and these two objectives represent the fundamental purposes of Congress in passing the Natural Gas Act. As an addendum to the Commission's aforesaid fourth "policy consideration" it throws out a bogey. It fashions this apparition in the following statement (R. 179a):

> And how long the pipeline can continue to buy in competition with *nonjurisdictional*, large volume purchasers, or indeed how long it might be willing to undertake such less desirable service, is at least a question.[1]

We have heretofore adverted to the fact that no insatiable market exists for the purchase of direct, or non-resale gas. The pipelines presently compete for their gas supplies with each other and there is no reason to believe that they cannot or will not continue to buy gas successfully, even in the presence of non-jurisdictional buyers. Furthermore, the Commission puts to one side the fact that for many years, annual additions to the nation's gas reserves have exceeded the annual consumption, as is shown in Appendix A hereto.

(5) After reciting the aforesaid "policy consideration," the Commission added a fifth consideration

[1] Just what is meant by "how long it might be willing to undertake such less desirable service" is confusing to say the least

which tipped the scales[1] against Transco (R. 179a):

> These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance.

Under the prodding of the Department of Air Pollution Control of the City of New York, Con Edison invested large sums in an unsuccessful attempt to eliminate the air pollution caused by its Waterside Station. Denied a firm supply of natural gas at its Waterside Station by the Commission's action in turning down the X-20 service, Con Edison has been unable to acquire the firm gas supply needed to clean up the air pollution caused by its generating stations on Manhattan Island.[2] Complaints on the condition of this

---

[1] See, *Department of Conservation* v. *Federal Power Commission*, 148 F.2d 746 (5th Cir. 1945), *cert. denied*, 326 U.S. 717 (1945). "Assuming, without deciding, • • • that considerations of conservation had a place in such granting or refusal [of a certificate], we think it quite plain that the statute does not make such matters determinative" (148 F.2d at 749-750).

[2] The X-20 service involved in this proceeding represents the first of two steps which Con Edison planned to undertake in an effort to suppress air pollution caused by its power plants. The 50,000 Mcf per day service denied by the Commission was intended for use in the Waterside Station. The second phase of the X-20 service was intended to be an additional transportation service of 70,000 Mcf per day which would be used to reduce the 42,000 pounds of flyash and 360,000 pounds of sulphur dioxide emitted each day by Con Edison's East River Station (R. 44a). This would also result in a further reduction in Con Edison's operating costs because gas is less expensive than coal or oil (R. 33a, 102a). Thus, the Commission's action in denying the X-20 service for the Waterside Station has also frustrated Con Edison's access to a firm supply of natural gas for its East River Station.

latter plant on the occasion of the present meeting of the General Assembly of the United Nations led to the following editorial in the New York Times:[1]

RIGHT FOR ONCE

> In the cosmic scale of values it was a small point, but Premier Khrushchev of the Soviet Union was right for once when, as his arriving ship passed the Consolidated Edison East Fourteenth Street power plant, he said he saw too much black smoke pouring from the stacks. They order things better in Russia, he said, by getting rid of the air pollution problem through conversion from coal to natural gas to generate electricity. It is disconcerting to be in agreement with Premier Khrushchev. But, like him, we also dislike smoke. Confession is good for the soul. * * *

The Commission's conclusion that the proposal herein involves an "inferior" use of gas is made in the face of the only evidence of record which establishes that such use is a patently "superior" use. In support of the use of gas at Con Edison's Waterside Station, counsel for the City of New York, at the direction of Mayor Wagner, produced as a witness, Dr. Leonard Greenburg, Chairman of the Department of Air Pollution Control of the City of New York and one of the most renowned authorities in America on the subject of air pollution as related to public health.

Dr. Greenburg testified that stack emissions from two of Con Edison's generating stations in New York City are of serious concern to the Department of Air Pollution Control. One of these stations is the Waterside Station here involved. He stated that at the insistence of his agency, Con Edison had spent some

[1] New York Times, September 22, 1960, page 26L.

$38,000,000 since 1953 in attempting to control air pollution from all of its stations (R. 49a), but that even this has failed to provide an adequate solution to the control of the flyash and sulphur dioxide emissions from the stack serving Boilers 71 and 72 of the Waterside Station for which the only corrective is conversion to natural gas or complete replacement of these boilers at a cost of about $12,000,000 (R. 49a-50a). The replacement of these boilers would take some four years to accomplish. He testified that these two boilers alone emit into the city's atmosphere some 15,000 pounds of flyash and 42,000 pounds of sulphur dioxide *each day* (R. 41a, 42a) and that the conversion of these boilers to natural gas would reduce the flyash emission from the entire station (which contains eight additional boilers) by 60 per cent and the sulphur dioxide contamination from the station by 22 per cent (R. 50a).

Dr. Greenburg further testified that smoke and air pollution in the New York area is an irritating influence for the millions of inhabitants in the New York area, that pollution causes damage to buildings, painting, finishes, textiles, clothing, vehicles and other items, and that cleaning costs in the area are increased to a major extent by air pollution (R. 40a). Health may be adversely affected, especially in persons liable to asthma and lung impairments (R. 40a). Aircraft flights into and out of the New York-New Jersey area, which include some of the world's busiest airports, are hampered by poor visibility attributable to air pollution (R. 40a). On the health aspects, he said further (R. 48a-49a):

> [S]ome information is emerging, and * * * we believe that the health implications inherent in the continued exposures to mixtures of soot, flyash and sulphur dioxide gas which are continually

> emitted by these power plants, is something to be regarded with suspicion. There is mounting evidence from many sources that exposure to a mixture of such dust and sulphur dioxide can cause marked irritation of the respiratory tract, and obviously, an official agency such as ours can not be blind to the health implications which are inherent in this situation.

The best that the Commission could do with this evidence was to brush it aside with only superficial comment (R. 178a):

> Likewise, the idea of relieving the United Nations headquarters of an unpleasant and annoying smoke nuisance from the particular boilers in which this gas is proposed to be burned is an appealing one.

and (R. 181a):

> Although as indicated, the idea of ameliorating a smoke condition found unpleasant and annoying by the workers in a unique facility, the United Nations headquarters building, is an attractive one, more weighty considerations compel the denial of the grant.[1]

We believe that the Court below was entirely correct when it stated (R. 323-324):

> More serious, however, is the assumption which the Commission makes that the proposed use was "inferior." It is true that the gas, under the agreement, was not to be sold and it was established that it was to be used to fire boilers. But these boilers, according to the evidence, generate power for electricity and make steam for heating.

---

[1] However, on rehearing, the Commission said that it considered with care the factors contained in the Greenburg testimony (R. 191a).

We do not see that using gas to make steam to heat an apartment house is inferior to the use of gas to heat a single family residence whether by steam, hot water or whatnot. *The cases the Commission had here were not those of the use of gas for industrial purposes only.* There was involved also the use of gas in a step for space heating and lighting. That factor was completely ignored by the Commission so far as its opinion reveals.

The Commission's failure to consider fully the uncontradicted evidence concerning the air pollution problem was error, being contrary to general law, contrary to the Natural Gas Act particularly in the hearing requirement of Section 7, and contrary to the intent of Section 10(e) of the Administrative Procedure Act. [5 U.S.C. § 1009(e)] [1]

---

[1] 5 U.S.C. § 1009(e). Section 10(e) provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

• • •

(e) Scope of Review.—So far as necesary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;* (2) contrary to constitutional right, power, privilege, or immunity; (3) *in excess of* statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) *unsupported by substantial* evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court *shall review the whole* record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

III

THE FACTORS OR "POLICY CONSIDERATIONS" UPON WHICH THE COMMISSION DENIED THE CERTIFICATE ARE IN CONFLICT WITH THE INTENT AND POLICY OF CONGRESS AS EXPRESSED IN THE NATURAL GAS ACT.

The Commission has attempted to create a statutory jurisdiction which it does not have through a very broad interpretation of the standard of "public convenience and necessity." The Commission argues that the standard of "present or future public convenience and necessity" set forth in Section 7 of the Natural Gas Act presents a virtually limitless variety of interpretation and adaptation in order to permit effectuation of the broad policy objectives committed to the Commission's jurisdiction. (Com. Br., pp. 45-55). It is argued that the term is "broad by design" because Congress could not be expected to specify the almost infinite number of problems that would confront the Commission, or the varying circumstances and events which would involve the Commission's jurisdiction.

The standard of "public convenience and necessity" was never intended as an open-ended grant of power to the Commission by Congress under the Natural Gas Act. Congress deliberately limited the jurisdiction of the Commission by both affirmative enumeration of its powers and specific denial of jurisdiction. However broad the standard of public convenience and necessity may be, it cannot be used as a device to rewrite the statutory grant of power to achieve a result which the Commission might deem wiser or more effective than the action actually indicated by Congress. Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

To understand the term "public convenience and necessity" one must begin with the provisions of the

statute in which that standard appears and evaluate its application in terms of the purpose for which the statute was enacted. When a finding of "public convenience and necessity" is made, ". . . that finding must have been based on the proper statutory criteria and must have had the necessary factual findings to support it." *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 64 (1945). To the extent that application of this standard requires the exercise of discretion, this Court has said ". . . that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented, we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. * * * [W]e would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress." *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 88 (1957).

The Commission goes much too far when it says that "the normal involvement of a regulatory Commission 'with an infinite variety of circumstances' entrusted to its decision makes it necessary for it to consider all of the factors that a *legislature would examine if it were to decide on a proposed course of action.*" (Com. Br., p. 48) Literal application of this alleged principle would wipe out the decision of the legislature as to the functions of the agency which it had set up. The decisions of this Court support the view that the term "public convenience and necessity" can only be interpreted within the framework of the statute concerned, with a view to Congressional policy objectives and

limitations set forth in other laws which are clearly applicable to the facts under consideration.

A. The Commission Has Exceeded Its Jurisdiction And Authority Over Transportation In Interstate Commerce Under the Natural Gas Act.

Stripped of all their window dressing, the Commission's five "denial factors" add up to no more than an unsubtle attempt to obliterate from Section 1(b) of the Act the words "for resale" and the words "but shall not apply to any other transportation or sale of natural gas * * * or to the production or gathering of natural gas" and also to obliterate the words "for resale" from Section 2(6) of the Act. This end is sought to be accomplished by assertion of an unlimited authority over "transportation" and an inflation of the words "public convenience and necessity" entirely beyond the meaning of such words as they appear in the setting of the Natural Gas Act.

But Congress has never removed the words "for resale," despite several importunities by the Commission to do so.[1] Section 1(b) of the Act still reads as follows:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*

[1] See, *e.g.*, 31 F.P.C. Ann. Rep. 145 (1951), 38 F.P.C. Ann. Rep. 16 (1958).

Under this statute, the Commission has only a limited jurisdiction over the proposed X-20 service.

The Act clearly withholds from the Commission jurisdiction over the proposed direct sale by the producers to Con Edison. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951). "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947). "[T]he Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502, 503 (1949).

The Commission obtains whatever jurisdiction it has over the X-20 transportation service by virtue of the fact that Con Edison has its Waterside Station on Manhattan Island in New York City rather than in Texas and the gas purchased from the producers is to be transported in interstate commerce to New York

City by Transco.[1] This brings us to the essential question of the nature and scope of the Commission's jurisdiction over a transportation project in a certificate proceeding.

The primary aim of the Natural Gas Act is to "protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610 (1944). Who are the consumers to be protected in a transportation project? Not Con Edison, except that it can only be charged a lawful transportation rate, because the sales to Con Edison are non-jurisdictional. The consumers of natural gas to be protected are those served by Transco's wholesale customers. How can this protection be effected? The Commission has sufficient jurisdiction to assure that the proposed transportation service (1) does not impair the ability of the pipeline company to provide adequate and reasonable natural gas service to existing customers, and (2) does not result in the grant of undue privilege or discrimination contrary to the mandates of rate Section 4(b) of the Natural Gas Act. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 472 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956). This represents the extent of the Commission's jurisdiction under Section 7 of the Natural Gas Act over the transportation in interstate commerce of natural gas purchased under non-jurisdictional contracts.

The Commission has denied the application of Transco principally on the grounds that: (1) the

[1] Where the transportation in interstate commerce is effected by the direct consumer through its own facilities, the Commission has recognized that it has no jurisdiction over the transportation. *Montana Power Company*, 10 F.P.C. 950 (1951).

purchase of gas in the field by Con Edison under a non-jurisdictional contract will deny the Commission jurisdiction over the purchase price of the gas will result in bidding up the price of gas in the field, and will be followed by other projects of the same character; and (2) Con Edison will use the gas as boiler fuel in its Waterside steam electric generating station. In our view, the Commission thereby unlawfully attempted to engross within its jurisdiction the production and distribution segments of the natural gas industry and direct sales to consumers which Congress expressly declined to allow it to control.

B. The Commission Does Not Have General Conservation Authority Through Control of Production, or Direct Sales by Producers, or "end use".

While disclaiming that the Commission has ever asserted general authority over the gas supply of the United States (Com. Br., p. 25; Coal Br., p. 9), both Petitioners, nevertheless, claim that the Natural Gas Act does authorize the Commission in certificate proceedings under Section 7 of the Act to consider what Petitioners call the "end use" of natural gas. But this characterization of the Commission's asserted authority is merely a play on words. For the assertion of authority over "end use" is merely another way of claiming power to determine which fuels are most appropriate for particular purposes and thereby to conserve gas.

Since this involves consideration of broad problems of far-reaching social and economic impact, Commission authority in this regard is not lightly to be implied, particularly since the Commission's expertise —confined as it has been to natural gas—does not extend to the resolution of such problems. Rather, we

believe that in view of the magnitude and importance of the problems to the conflicting interests involved, a considered authorization by Congress explicitly formulated is, as the Court below held (R. 312), required before Commission authority over conservation and end use can be sustained.

1. *The Natural Gas Act.* Far from granting such explicit authority, the Act plainly negates any possible basis for even implying any power in the Commission with regard to conservation. There is no question that the Commission is without authority over the production, transportation or consumption of gas of a purely intrastate nature—an area in which conservation in all its senses is of importance comparable to the interstate field. But even as to the interstate area, Section 1(b) of the Act exempts from Commission regulation "the production or gathering of natural gas" an exemption which this Court has long since recognized was intended to leave the production aspects of conservation to the states.[1] The only authority vested in the Commission with regard to the production phases of gas conservation is contained in Section 11(a) of the Act [15 U.S.C. § 717j(a)][2] which

---

[1] *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602-603 (1945); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612-613 (1944); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 504-505 (1949).

[2] Section 11(a) provides:

> In case two or more states propose to Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may

enjoins the Commission to cooperate with any two or more states which shall enter into compacts dealing with "the conservation, production, transportation, or distribution of natural gas". Since any effective conservation program as far as use is concerned is inextricably tied to the quantity being produced, denial by the Commission of authority over production strongly belies any intent that the Commission controls conservation as far as end use is concerned.

Further negating such Commission power over conservation are the provisions (1) withholding the authority from the Commission over the rates charged for direct industrial sales (Section 1(b)) and (2) forbidding suspension of rates for sales for industrial resale (Section 4(e)). Since the rate charged is frequently the determinative factor in whether gas will be used for a particular industrial purpose, denial of Commission jurisdiction over such rates similarly manifests the absence of any Congressional intent to vest authority in the Commission over the end use of gas.

2. *Legislative History.* Ignoring the statutory provisions which thus belie their claim, Petitioners seek to find support for their position in the Act's legislative history. Properly read, however, the Act's history falls far short of supporting Petitioners' contention.

(a) *The Federal Trade Commission Report.*[1] In

---

appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

[1] Senate Document 92, Part 84-A; Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Session (1936).

support of their contention, Petitioners refer first to the report of the Federal Trade Commission cited in Section 1(a) of the Natural Gas Act. But while that report mentions end use in passing, the Trade Commission clearly was concerned solely with conservation in connection with production and regarded such conservation as a matter within state control. This is clear from the outset of the Trade Commission's general discussion of "Conservation" (p. 101) which begins with the comment (*ibid.*):

> The economic necessity for conservation of natural gas lies in the importance of preventing excessive waste of this limited and exhaustible natural resource, the exploitation of which is subject to the effects of selfish and short-sighted operations. The interest of the public consists in conserving gas for those uses for which it is especially adapted, and in conserving the gas energy in the ground as a means of increasing oil production. Conservation as applied to natural gas, therefore, affects both the gas industry and the oil industry. The economic interests concerned are so numerous and so often in conflict that it is hopeless to expect the formulation or application of an effective plan for preventing waste by these interests unassisted by public authority.

The concern with production and physical waste thus manifested permeates the Trade Commission's entire treatment of this problem. See Report at pp. 101-110, 124-128.[1]

---

[1] Thus, for example, under the subcaption "*Requisites of effective conservation,*" the Report notes (p. 106):

> Essential features of any effective plan for conservation of natural gas must give equitable consideration to the conflicting interests involved in its production and use, the practical operating conditions imposed by the close relationship of oil and

The Trade Commission's conclusions similarly reveal that its primary concern as to conservation related to physical waste in production (p. 608):

> Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. This has been estimated to amount to as much as a billion and a quarter cubic feet per day in one field. Witnesses having expert knowledge testified that this amount of daily waste is sufficient to supply the entire present needs of the domestic and commercial users of natural gas in the United States.[1]

Not only did the Trade Commission thus focus its attention upon the problem involved in connection with controlling such physical waste rather than those of end use, but, as pointed out by the Court below (R. 313-314), the Trade Commission neither included end use among the sixteen "Specific Evils Existing in the Natural-Gas Industry" listed by it (pp. 615-616), nor did it make any recommendations as to control thereof. In contrast, the Report set out as a specific evil, "A great waste of natural gas in production" (p. 615) and went on to recommend (p. 616):

---

gas in nature, the fugitive nature of both, and the important function each performs in the production of the other. And finally a fully effective plan must be based on recognition of the important principle that, if regulation is to be effective, its scope, both territorially and with respect to legal jurisdiction, must be coextensive with the private and corporate interests involved.

[1] The impression which both Petitioners seek to create that the Trade Commission's statement that "Conservation is the first problem that demands attention" is directed to control of end use (Com. Br., p. 25; Coal Br., p. 13) is achieved by careful deletion and selection of materials.

Conservation, and termination of gas wastage. —The Commission recommends that natural gas producing States enter into compacts with each other, subject to Congressional approval, providing for the enactment of State conservation laws, with State boards determining the amount and respective quotas of gas to be produced and other fair and equitable measures for conserving the natural gas supply, having due regard for actual primary needs; recommendations as to amounts to be produced to be made to those State boards by some Federal agency invested by the Congress with full and continuous investigatory powers as to basic and all underlying and equitable conditions.[1]

(b) *The Natural Gas Act as enacted in 1938.* Contrary to Petitioners' implications (Com. Br., pp. 27-28; Coal Br., p. 15), the Natural Gas Act as enacted in 1938 does not support their position. In addition to the provisions of the Act already discussed *supra*, the Commission's certificate authority was limited under Section 7(c) of the 1938 Act to those situations where the new area to be served by the natural gas company was already being served by another natural

[1] The Commission's brief implicitly recognizes the absence of any recommendation by the Trade Commission as to control over end use. However, in a carefully phrased sentence, the Commission implies that the Trade Commission had no doubt as to the side on which the public interest lay (see Com. Br., p. 27). However, as the excerpt quoted by the Commission in a footnote (Com. Br., p. 27, fn. 18) plainly reveals, the Trade Commission regarded the problem of end use as one of extreme complexity, and despite the comprehensive nature of its investigation, still could not arrive at any view sufficiently firm to justify the formulation of a recommendation as to the appropriate policy to be adopted.

gas company.[1] The legislative denial to the Commission of authority over expansions into areas not thus served further indicates the lack of Congressional intent to extend Commission control over the end use of gas.

This is also clear from the legislative history of the 1938 Act. The only references to conservation contained in that history is the comment of Congressman Mapes, on the House floor (81 Cong. Rec. 6726):

> The only provision in the bill which seems to look to conservation of the natural gas resources of the country is contained in the provision relating to the State compacts.

This statement plainly refers only to conservation in the sense of physical production and recognizes that this is a matter for the states.[2]

---

[1] Section 7(c) as enacted in 1938 (52 Stat. 825) provides in pertinent part:

> No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such markets, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. • • •

[2] The Commission itself recognized shortly after the enactment of the 1938 Act that it had no control over conservation as the

(c) *The 1942 Amendment.* In urging that the 1942 amendment vested the Commission with control over end use, both Petitioners refer initially to the Commission's 1940 Report to Congress, which, they argue, Congress implemented by the 1942 amendment. But the specific recommendation made by the Commission in its 1940 Report that its certificate authority be enlarged (p. 10), makes no mention either of conservation or of control of end use.[1] The Coal interests' at-

---

end use of gas. See *Kansas Pipe Line & Gas Company*, 2 F.P.C. 29, 57 (1939):

> • • • We have already noted that section 7(c) of the Natural Gas Act does not give us unlimited jurisdiction over all proposed construction of facilities for the transportation of natural gas but that our jurisdiction attaches only when the proposed construction is of facilities *for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company.* In the light of that restriction on our jurisdiction and having regard to all other provisions of the Natural Gas Act, it would appear that Congress did not intend this Commission generally to weigh the broad social and economic efforts of the use of various fuels. Under section 7(c) of the Act our duty is to safeguard the convenience and necessity of the public as it may be affected by proposed extensions or constructions of facilities for the transportation of natural gas to markets, as herein defined, in which natural gas is already being served by another natural-gas company. We see nothing in the legislative history of the Natural Gas Act to alter our conclusions hereon. (Italics in original.)

[1] Indeed, to the extent that any of the specific recommendations made in the Commission's 1940 Report can be said to have any bearing here, the further recommendation that the Commission's "rate regulatory authority should be extended to sales of natural gas from interstate pipelines for industrial as well as domestic and commercial purposes" (p. 11), is far more pertinent. This recommendation, it should be noted, has not been adopted by Congress to this day even though repeatedly reiterated thereafter by the Commission. See, *e.g.*, 32 F.P.C. Ann. Rep. 152 (1952); 33 F.P.C. Ann. Rep. 154 (1953).

tempt to read the Commission's earlier discussion of conservation into its recommendation as to broader certificate authority (Coal Br., pp. 15-16) involves an unwarranted coalescence of two separate and distinct matters, entirely contrary to and inconsistent with the format of the 1940 Report, and in particular of the section in which these matters are discussed.

The recommendation which the Commission now finds in its 1940 Report similarly requires a juxtaposition of language. The excerpt quoted in the Commission's brief (at pp. 30-31) concerns "Applications for Authorization of New Pipe Lines" (1940 Report at p. 77). In contrast, the discussion of "The Question of Conservation" shows that while the Commission is concerned about the problem of conservation and control of end use, it felt that the problem was so complex that further study was needed before an affirmative recommendation for Congressional action could be made (1940 Report at p. 79). Thus, the fact is that the Commission's 1940 Report made no recommendations as to conservation or end use.[1]

As to the 1942 amendment itself, there is nothing in its history which in any way even suggests that its purpose was to give the Commission control over the end use of gas. While that amendment extended the

[1] Quoting from this Court's opinion in *Federal Power Commission* v. *East Ohio Gas Company*, 338 U.S. 464, 468-469 (1950) which suggests that the 1942 Amendment followed the Commission's 1940 report, the Commission would imply there was a causal relationship between these two events (Com. Br., p. 39; see also Com. Br., pp. 30-31). It is true that the 1942 amendment chronologically followed the 1940 Report, but any inference that the 1942 amendment, either in its wording or in any part of the legislative purpose, purported to follow the 1940 Report in any other sense, is contrary to the fact.

Commission's certificate authority to all expansions and extensions of service by natural gas companies, the Commission's spokesman, Commissioner Manly,[1] stressed:[2]

> I wish to emphasize what seems to me to be the most important aspect of the proposed amendment from the standpoint of the public interest. It will have the effect, in our opinion, of giving the Federal Power Commission an opportunity to scrutinize the financial set-up, the adequacy of gas service, the feasibility of the proposed service, and the characteristics of the rate structure at a time when such vital matters can be revised and modified as the public interest demands.

As this statement makes clear, the primary purpose of the amendment was to provide further rate protection to the ultimate consumers of gas. Nothing therein contained relates to conservation or control of end use.

Commissioner Manly also pointed out that the proposed amendment had the further purpose of clarifying the right of the coal, railroad and labor interests to intervene in certificate proceedings before the Commission (see Hearings at pp. 4-5). But the right to participate so accorded these interests falls far short of constituting a direction to the Commission to consider as a substantive matter the impact of the proposed expansion upon them. In *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470

[1] The Commission had drafted the proposed amendment in cooperation with the various interests involved, and hence Commissioner Manly's appearance was in effect as sponsor of the legislation.

[2] Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., on H.R. 5249, p. 6.

(1940), this Court, while holding that under the Communications Act economic injury gives standing to appeal an administrative order, simultaneously ruled (309 U.S. at 476):

> * * * economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether to grant or withhold a license.[1]

Inasmuch as the 1942 amendment was enacted as thus proposed by the Commission, this broadening of the Commission's certificate authority in no way enlarged the Commission's substantive responsibility as to conservation or end use.

In view of the Commission's role with regard to the 1942 amendment, it is also significant that the Commission itself shortly thereafter recognized that the amendment did not authorize it to consider end use in certificate proceedings. In its report to Congress, *First Five Years Under the Natural Gas Act*, dated January 1, 1944, the Commission stated (p. 15):

> The Commission is keenly aware of the importance of conservation and the serious problem raised by the continued construction of large natural-gas pipe lines and the accelerated depletion of our natural-gas reserves due to war activity. In its annual report to Congress for the year 1940 the Commission discussed this question at some length. In that report a number of important questions were raised, but it would appear that further studies and investigations must be con-

[1] See, also, *National Coal Association* v. *Federal Power Commission*, 191 F. 2d 462, 467 (D.C. Cir. 1951).

ducted before satisfactory answers to these important and difficult questions can be formulated.

* * *

It has been the unanimous view of the Commission[1] that, inasmuch as the Congress has not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, *it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise.*

(d) *G-580 Investigation.* In line with this recognition that further studies were needed before satis-

---

[1] At this point the Commission refers to its opinion in *Tennessee Gas and Transmission Co.*, Opinion No. 93-A (3 F.P.C. 574, 578-579 (1943)) in which as noted by the Coal Petitioners (Coal Br., p. 21, fn. 19) the Commission, adverting to the contentions of the coal interests, commented (3 F.P.C. at 579):

> We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these intervenors. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, *which class of gas sales furnishes the keenest competition to the coal industry.* Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas Act does not vest this Commission with complete and comprehensive authority which would permit us to act as arbiter over the end uses of natural gas.

Contrary to the Coal Petitioners (Coal Br., pp. 21-22), these comments by the Commission manifest a recognition that the comprehensive authority with regard to interfuel competition was needed before action in that area would be appropriate and that the enlargement of certificate jurisdiction alone did not justify any inferences of authority in that regard.

factory answers to these problems could be evolved,[1] and that the implementation thereof required specific authority from Congress, the Commission by order dated September 22, 1944, instituted its G-580 Investigation (4 F.P.C. 725, 727):

> An investigation be and hereby is instituted into the extent and probable life of natural gas reserves; present and prospective measures for preventing waste and prolonging the life of such reserves; the present and probable future utilization of natural gas for domestic, commercial and industrial purposes; the extent, character and results of the competition of natural gas with other fuels; and such related matters as may be helpful in the administration of the Natural Gas Act or in determining what additional legislation if any, should be recommended; * * *[2]

After extensive hearings held in various sections of the country, the Commission issued its reports on April 28, 1948, in which the Commissioners were in fundamental disagreement over conservation and as to the desirability of controlling the end use of gas (compare Smith-Wimberly Report at p. 13 with Olds-Draper Report at pp. 12-13, with the former expressing the view that the expansion of the industrial use of gas was highly desirable at p. 13).[3]

---

[1] See, also, *Memphis Natural Gas Company*, 4 F.P.C. 197, 209 (1944).

[2] See, also, 26 F.P.C. Ann. Rep. 66-70 (1946).

[3] In the course of these hearings, sharp controversy had arisen as to regulation of independent producers. The Smith-Wimberly Report (at p. 8) recommended amendatory legislation to make it clear that producers were not subject to regulation. It was to this recommendation that the Olds-Draper Report commented (at p. 12), as noted by the Coal Petitioners (Coal Br., p. 23), that "the Natuarl Gas Act, as amended, should not be further amended in any fundamental way".

(e) *Commission Reports.* Thereafter, apparently because the complexity of the problem did not lend itself to a definitive recommendation as to conservation or control over end use generally, the Commission in its 1951 Report to Congress recommended (31 F.P.C. Ann. Rep. at p. 145) that it be given control over "the end-use of natural gas" in certain limited situations, *i.e.*, "when required for national defense or to safeguard the available supply".[1] With Congress failing to take any action on this recommendation, the Commission thereafter watered down its recommendation to provide such control "when required for national defense or to safeguard the available supply *in emergency situations*" (34 F.P.C. Ann. Rep. 170 (1954)).[2] Congress, however, has not to this date enacted this recommendation into law.

In these circumstances, the Court below properly held that the Natural Gas Act vested no authority in the Commission with regard to conservation through control of the end use of natural gas (R. 312).

3. *"Consideration" of End Use in Certificate Proceedings.* Petitioners argue at length (Com. Br., pp. 45-55; Coal Br., pp. 33-38) that even if the Natural Gas Act does not authorize the Commission to control the end use of natural gas, the Commission, nevertheless, can consider such end use as part of the "total situation" which goes to make up the public interest. In this connection, Petitioners contend that "public

[1] See, also, 32 F.P.C. Ann. Rep. 152 (1952); 33 F.P.C. Ann. Rep. 154 (1953).

[2] See, also, 35 F.P.C. Ann. Rep. 182 (1955); 36 F.P.C. Ann. Rep. 18 (1956); 37 F.P.C. Ann. Rep. 24 (1957); 38 F.P.C. Ann. Rep. 16 (1958); 39 F.P.C. Ann. Rep. 19 (1959).

convenience and necessity" is to be given a broad scope, and rely heavily upon cases holding that considerations of national defense and antitrust policy are properly a part of the public interest complex.

While we agree that such matters should appropriately be considered by the Commission—just as the Commission should take into account the Air Pollution Control Act (See *infra* Part V)—when present in a particular case, it does not follow therefrom that end use may also be taken into account for the purpose of effectuating general conservation. To the contrary, the rationale underlying these cases strongly indicates the opposite result here. Thus, in *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (D.C. Cir. 1956), the District of Columbia Circuit Court, in holding that the Commission could and, indeed, should consider antitrust policy, reasoned (237 F. 2d at 754):

> * * * Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider *a congressional expression of fundamental national policy* as bearing upon the question whether a particular certificate is required by the public convenience and necessity.

In contrast, there has not been any congressional expression of policy as to conservation through end use control. To the contrary, as just shown *supra*, the problems of conservation through end use control has been recognized by Congress as well as the Commission as being one of extreme complexity, involving sharply conflicting sociological, economic and technological considerations. The Trade Commission despite its comprehensive investigation could not formu-

late any recommendations, nor did the Power Commission as a result of its G-580 Investigation. Moreover, although the Power Commission had recommended control of end use in certain limited situations, Congress has not seen fit to grant even such limited control to the Commission. Since there is in fact no policy, congressional or otherwise, formulated as to where the public interest lays with regard to end use of natural gas as related to conservation, there is no basis, under the *City of Pittsburgh*[1] and other cases cited by Petitioners, justifying such consideration of "end use" as a part of the "total situation" with regard to determining public convenience and necessity.

C. The Commission Has Unfairly Discriminated Against Transco, Con Edison and the City of New York in Denying Access to Sources of Natural Gas Supplies to Which Other Persons Have Opportunity of Free Access.

Through geomorphic accidents, most of the sources of natural gas in the United States are located at a considerable distance from the large industrial areas and heavy population centers of the North and North East. This accounts for the important role played today by interstate natural gas pipelines in providing efficient, low cost operation of industry in those areas.

Because of the unequal distribution of natural resources, it has been deemed essential from the origin of our country that the citizens of each state have equal opportunity of access to resources available in other states. See *State of Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, 310 (1924). No state can

---

[1] *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (D.C. Cir. 1956).

hoard the natural resources found within its boundaries to assure that the requirements of its own citizens will be met before allowing the export of such resources to other states. In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), this Court enjoined the State of West Virginia from impeding by legislation the export of its domestic natural gas supplies required by consumers in other states.

Congress did not exercise its plenary powers over interstate commerce in enacting the Natural Gas Act. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502, 503 (1949), choosing instead to limit the grant of authority to the Commission by a positive enumeration of jurisdiction over sales for resale for ultimate public consumption and transportation in interstate commerce and a specific denial of jurisdiction over any other sale, production and gathering, and distribution.[1]

When a producer finds a new gas supply which is not already committed to some purchaser by contract, the producer can, subject to state regulations relating to conservation of oil and gas, dispose of such gas supplies as it sees fit. The producer may use such gas supplies in its own operations, whether intrastate or interstate; sell the gas under contract to any local buyer in intrastate commerce; sell the gas under contract in interstate commerce to a direct consumer; or sell the gas under contract for resale in interstate commerce. Only the last category of sales is subject to the jurisdiction of the Federal Power Commission, but even here Congress has seen fit to leave the contractual arrangements initially to the buyer and seller,

[1] See Section 1(b) of the Act, 15 U.S.C. § 717(b).

the protection of the public interest being afforded by Commission supervision of the contract which must be filed with the Commission and made public. *United Gas Pipe Line Company* v. *Mobile Service Corporation*, 350 U. S. 332, 339 (1956)

Due to the proximity of intrastate markets to the gas fields and the consequent economies in short-haul transportation by pipeline, 44% of the natural gas produced in the United States in 1958 was consumed in the state in which it was produced.[1]

Steam electric generating stations provide the largest single market for intrastate sales of natural gas. In 1958, over 640 billion cubic feet were consumed in the states of Texas, Louisiana and California for this purpose.[2] Using these states for illustrative purposes, we note that approximately the same volume of gas was consumed as boiler fuel in that year in steam electric generating stations in Texas as was sold for all purposes in the entire state of New York.[3] More gas was used for the same purpose in the state of Louisi-

---

[1] Of the 11.7 trillion cubic feet of net production in the United States in 1958, only 6.5 trillion cubic feet were exported to other states. The volume exported varied from state to state. Texas exported approximately 50% of its production. California exported none, consuming not only all volumes produced in the state, but also 721 billion cubic feet imported from other states. "1960 Gas Facts," American Gas Association, Tables 24 and 59.

[2] Except where otherwise shown the data quoted in the next few paragraphs were obtained from "Consumption of Fuel for Production of Electric Energy, Electric Power Statistics", Federal Power Commission, 1958; and "1960 Gas Facts", *supra*.

[3] In excess of 350 billion cubic feet of gas used for the production of electric energy in Texas, while approximately 365 billion cubic feet of gas were used for all purposes in the state of New York.

ana[1] in 1958 than was used for all purposes by the people of the states of Massachusetts, New Hampshire and Rhode Island. Public utilities in California[2] used almost as much gas as boiler fuel for the generation of electricity as was used for all purposes in the state of Michigan.

When our investigation becomes more particularized, we find that the electric consumers of only a few public utilities in the United States were the major beneficiaries of this economic use of natural gas for the generation of electricity. In California, Pacific Gas & Electric Company, which serves a population of 6,500,000, used over 116 billion cubic feet of gas as boiler fuel in its own steam electric generating plants in 1959.[3]

The Pacific Lighting Corporation system, of which *amici* Southern California Gas Company and Southern Counties Gas Company of California are subsidiaries, sold almost 25% of its gas in 1959 for use as boiler fuel in steam electric generating stations.[4] In its 1959 Annual Report, the Board of Water & Power Commissioners of the City of Los Angeles, which is a major customer of the Pacific Lighting system, stated:

---

[1] 90 billion cubic feet were used in Louisiana for the production of electric energy as against 83 billion cubic feet used for all purposes in the states of Massachusetts, New Hampshire and Rhode Island.

[2] In California over 205 billion cubic feet were used for the production of electric energy, while 283 billion cubic feet of gas were used for all purposes in the state of Michigan.

[3] 1959 Report to Stockholders of Pacific Gas & Electric Company, page 16.

[4] This represents 121 billion cubic feet out of a total sales volume of 489 billion cubic feet. Annual Report to the Shareholders of Pacific Lighting Corporation for 1959.

> During the year, natural gas met 67% of the fuel requirements in the Power System's steam plants. In compliance with new requirements of the Air Pollution Control District of Los Angeles County, gas fuel only was scheduled to be burned in steam plants from May through September, 1959, and also at other times when air pollution was forecast. During the remainder of the year, either gas or fuel oil was burned, whichever provided the greater operating efficiency and economy at the time.[1]

Turning next to Texas, we find that Houston Lighting & Power Company, which serves a population of 1,575,000, used approximately 90 billion cubic feet of natural gas as boiler fuel in its steam electric generating stations in 1959,[2] while Dallas Power & Light Company, which serves a population of approximately 748,000, utilized almost 33 billion cubic feet of natural gas for the same purpose.[3]

These statistics are not recited for the purpose of indicating that such consumption is made at the expense of consumers in other areas of the United States, but to show that there has never been a valid contention that natural gas should not be used for the purpose of generating electricity where low cost and ease in handling contribute to the maintenance of low prices to electric consumers and the reduction of air pollution in the communities served.

The inhabitants of New York City were not able to enjoy the benefits of natural gas until 1951 when

---

[1] Annual Report, page 13.

[2] FPC Form 1 filed by Houston Lighting & Power Company for the year 1959. By contrast, Con Edison serves a population of 8,800,000.

[3] Dallas Power & Light Company, FPC Form 1 for 1959.

Transco completed the first interstate pipeline system connecting the gas fields of Texas and Louisiana with Manhattan Island. Now that the citizens of this metropolitan area are afforded for the first time an opportunity to have air pollution reduced as well as their electric bills, the coal and railroad interests and the gas companies of far off California appear before this Court to deny them these advantages. We submit that there is a patent injustice inherent in the position taken by these Petitioners and *amici* who wish to reserve to themselves the markets which they now largely supply. It is obvious that neither the coal and railroad interests nor the California utilities want any competition. They wish all fuels to pass to the customer through their hands.

At a later point in this Brief we discuss the anti-competitive results which Petitioners and *amici* seek in this proceeding, contrary to the intent of Congress expressed in the Natural Gas Act and in the antitrust laws.[1] At this point, we wish to emphasize that Congress made it clear that the Natural Gas Act was to be administered in such fashion that discrimination between areas and between customers would be eliminated insofar as interstate natural gas service is concerned. This is apparent from both the rate and certificate sections of the statue.

Section 4(b) of the Act provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue privilege or advantage to any person or subject any person to any undue privilege or disadvantage, or (2) *maintain any unrea-*

[1] See part IV, *infra*.

sonable difference in rates, charges, *service, facilities, or in any other respect,* either *as between localities* or as between classes of service.

In an attempt to limit the discrimination that might be practiced by an interstate natural gas pipeline between areas which its transmission system might traverse, Congress enacted Section 7(a) permitting the Commission to order a pipeline company to serve a customer adjacent to its system which it may have by-passed or refused to serve, provided that the Commission does not attempt to compel the pipeline company to enlarge its transportation facilities or require service when to do so would impair service to existing customers.[1]

In its first certificate case after passage of the Natural Gas Act, the Commission expressed its understanding of the intent of Congress to give the benefits of natural gas wherever it was economically feasible

---

[1] 15 U.S.C. § 717 f(a). Section 7(a) provides:

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

to areas of the country not theretofore served, in these terms:

> We do not view the term [public convenience and necessity] as meaning indispensably requisite. Rather we view the term as meaning a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both—without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated. See *Chicago, Rock Island & Pacific Railroad Company* v. *State, et al*, 258 Pac. 874; and *Abbott* v. *P. U. C.*, 136 Atl. 490. We do not construe the phrase to mean an absolute necessity but rather a reasonable necessity having regard to the convenience of the public in the area involved and its welfare. * * * We believe that the inconvenience of being without natural-gas service and the benefits accruing to the consuming public generally from natural-gas service are too well known to require intensive discussion here. See *McFayden* v. *Public Utility Consolidated Corp.*, 299 Pac. 671. Congress by enacting section 7(a) of the Natural Gas Act has unquestionably recognized this fact for it has given this Commission power to compel extensions of natural-gas facilities under certain circumstances. We believe that where there is no existing natural-gas service the convenience and necessity of the public in that area will be served by the introduction of that service providing that those who seek to render that service can meet certain minimum standards designed to secure such service on a continuous and adequate basis.
>
> We have already noted the fact that for that area lying east of Bismark, North Dakota, in central and eastern North Dakota, the North Dakota Railroad Commission has at one time issued cer-

> tificates authorizing the extension of natural-gas service thereto. This fact confirms, for a portion of the territory which we are considering, our conclusion that natural-gas service therein will serve the convenience and necessity of the consuming public in that area.[1]

We submit that by its denial of the X-20 service, the Commission has acted inconsistently with the provisions of the Natural Gas Act and with its interpretation of the content of public convenience and necessity as set forth in the *Kansas Pipe Line* case. Moreover, its action, being inconsistent with that taken in proceedings involving other pipeline companies and other consumers, represents an unlawful discrimination against Transco, Con Edison and the inhabitants of New York City.

It is apparent from the provisions of the Act which we have cited above that there was no intention on the part of Congress that the Natural Gas Act would be so administered as to effect discrimination between consumers or between areas of the country. Yet the Commission has accomplished just such a discriminatory result here. This is apparent from an examination of some of the Commission's prior cases.

Since 1948, the Commission has authorized several large volume transportation services without any expressed concern over the "policy considerations" or "factors" upon which it based its denial of the Con Edison X-20 service. In 1953, the Commission authorized a transportation service beneficial only to citizens of Canada when it empowered Tennessee Gas Transmission Company to transport from Louisi-

---

[1] *Kansas Pipe Line & Gas Company*, 2 F.P.C. 29, 56, 57 (1939).

ana for delivery at Niagara Falls, New York, to Niagara Gas Transmission, Limited, volumes of gas which the Canadian corporation purchased in south Louisiana for ultimate consumption in Toronto, Canada.[1] This arrangement called for the transportation from the gas fields of approximately 62 million cubic feet per day and peak day deliveries at the Canadian border of approximately 115 million cubic feet per day through utilization of storage.

By the same order, Tennessee Gas was authorized to transport to Pennsylvania approximately 50 million cubic feet per day which Iroquois Gas Corporation, a public utility, had contracted to purchase from producers in Texas.

As early as 1948, the Commission had authorized this same pipeline company to transport up to 111 million cubic feet per day purchased by The Manufacturers Light & Heat Company, a public utility, from producers in Texas, which volumes were to be delivered by Tennessee Gas to Manufacturers in Ohio or to its affiliate, the United Fuel Gas Company, in Kentucky.[2]

The same United Fuel Gas Company obtained the Commission's approval of another transportation project in 1953.[3] United Fuel contracted to purchase gas from producers in Louisiana and arranged to have these volumes transported to Kentucky through its affiliate, Gulf Interstate Gas Company. While the

---

[1] *Tennessee Gas Transmission Company and Niagara Gas Transmission Limited*, 12 F.P.C. 311 (1953).

[2] *Atlantic Seaboard Corp., et al.*, 7 F.P.C. 1087 (1948).

[3] *Gulf Interstate Gas Company*, 12 F.P.C. 116 (1953).

Commission appeared to be not happy about the effect of the prices in the United Fuel producer contracts upon price levels in south Louisiana, the Commission declined to deny the transportation service on the basis that the presence of this giant purchaser in the field would serve to raise natural gas prices.

More recently, the Commission authorized the construction of a pipeline system from Texas and Louisiana to Florida which involved the approval of the transportation of up to 150 million cubic feet per day purchased by two large Florida power companies from producers in Texas and Louisiana, which volumes were to be used as boiler fuel in steam electric generating stations.[1]

Certain of the distribution companies in the north central part of the United States have obtained their supplies of natural gas by organizing subsidiaries or affiliates who constructed pipeline systems under Commission authorization connecting the distribution systems with gas supplies in Texas, Oklahoma and Louisiana. Thus gas is distributed in Detroit by Michigan Consolidated Gas Company, which obtains supplies of natural gas from Texas and Oklahoma through the pipeline owned and operated by Michigan-Wisconsin Pipe Line Company and from Louisiana through the pipelines of American Louisiana Pipe Line Company. All three companies are affiliates in the same holding company system. Gas is distributed locally in Chicago by People's Gas, Light & Coke Company, which obtains the majority of its supplies through two affiliated pipelines which have their roots in Texas and Louisiana.

---

[1] *Houston Texas Gas & Oil Corp., et al.*, 16 F.P.C. 118 (1956).

Nowhere does the Commission distinguish between the circumstances of Con Edison, which has contracted with producers in the field and arranged to have its gas transported to New York City by an independent pipeline company, and the situation of People's Gas, Light & Coke Company and Michigan Consolidated Gas Company which have negotiated for their gas supplies through subsidiaries or affiliated pipeline companies.

Any time the Commission denies to an area of the country a more efficient, lower cost fuel than is at present available to consumers, it sets in motion serious economic consequences which go far beyond its power to regulate, both as a statutory and a practical matter.

Recent decades have witnessed the migration of industry within the United States from high cost, high tax, northern and northeastern communities to those in the south, southwest and west which are closer to sources of energy and raw materials and promise lower production costs. By denying Con Edison access to a firm supply of lower cost fuel for its steam electric generating stations, the Commission has not only deprived Con Edison of the means to effectively combat air pollution, but it has forced Con Edison into a position where it must sell its electricity at a higher price than would be the case if it could obtain a lower cost source of energy. The Natural Gas Act permits no such discrimination. The legislative history makes it plain that Congress intended no such result. Thus the Commission has acted in an arbitrary, capricious and discriminatory manner and abused its discretion by exceeding its jurisdiction in the Natural Gas Act.

IV.

THE COMMISSION'S DECISION IS CONTRARY TO THE POLICY SET FORTH IN THE ANTITRUST LAWS.

By its action in denying Transco a certificate for the proposed X-20 service, the Commission has effectively blocked Transco from any opportunity to compete with the coal and railroad interests in supplying on a firm basis the fuel requirements of steam electric generating stations located in the area served by Transco's transmission system between Texas and New York City. As a result, the electric utilities are deprived of an opportunity to lower their cost of fuel and, consequently, of the means for reducing the cost of electricity to home owners, commercial establishments and industries.[1]

By eliminating Con Edison as a potential purchaser of natural gas in the field, the Commission has deliberately reduced the number of persons able to bargain for a supply of natural gas.

In its report to the Senate of the United States, the Trade Commission, noting how interstate transportation of gas was then controlled by a few holding companies, observed:[2]

---

[1] The East Coast utilities which have power plants adjacent to deep water are presently restricted in their access to low cost oil for burner fuel by the enactment of legislation restricting the importation of fuel oil. See Presidential Proclamation No. 3279, 24 F.R. 178 (March 12, 1959), as amended by Presidential Proclamation No. 3290, 24 F.R. 3527 (May 2, 1959).

[2] Senate Document 92, Part 84-A, Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Session, pp. 590-591 (1936).

To the extent that large pipe-line interests do not need to buy gas from unaffiliated producers but obtain it from their own wells or from wells of affiliated companies, they are in a position to control the price at which independent producers must sell. In other words, control of the market outlets accentuates whatever control the pipeline interests have of the available gas supply. The relation between pipe-line purchasers is frequently so close by reason of community of ownership, reciprocal contracts, or informal cooperation that independent producers have nothing to hope for in the way of competitive bidding. Moreover, in certain large production areas, in drawing gas from their own wells on their own acreage the gas pipe line interests are frequently in a position to drain from the adjoining acreage of independents without payment. All these things tend to put an increasing proportion of the total natural gas production into the hands of pipe lines and their affiliates.

* * * * *

Without adequate ratable taking or purchase laws, or an unitized operation in the field, *the pipe lines have power to make or break at will any independent producer who is without pipe-line affiliations or facilities, or does not engage in local, usually wasteful, processing.*

With the lack of regulation or control of this matter in some places, it is not surprising that there have been frequent complaints against the pipelines. Perhaps all the complaints may not be justified, and there may be extenuating circumstances for pipe lines in certain cases, *but the problem nevertheless exists and calls for remedy.*

In its summary and conclusion the Federal Trade Commission listed among the problems presented, the following:[1]

[1] *Id.* at 608.

2. Many independent producers of natural gas are at the mercy of the present purchasing companies with pipe-line connections in their respective fields. Independent well owners, producers, or leaseholders should be assured the opportunity to sell gas under equitable, ratable taking at fair prices [to the producer] or to have it transported by pipe line at reasonable nondiscriminatory contract rates and delivered at a reasonable price at the city gateways without intermediate inter-system profits.

When it is considered that the monopoly position of existing purchasers in the 1930's permitted them to "make or break at will" the producer suppliers, it is apparent that any deliberate reduction in the number of purchasers represents a retrogression in the relief which the Federal Trade Commission recognized was necessary to independent producers.

A. The Provisions of the Natural Gas Act Make It Patent That Congress Intended That the Interstate Natural Gas Pipelines Would Not Be Disabled in Their Attempts to Compete Vigorously With Other Fuels in Supplying Industrial Requirements.

Congress inserted in Section 5(a) of the Act a provisions designed to assure that the Commission would not use its rate-making powers to set rates on natural gas which would stifle competition with other fuels.[1]

[1] The relevant part of Section 5(a) reads as follows:

Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or not the lowest reasonable rates.

This was accomplished by forbidding the Commission to raise rates unless the increase was in accordance with schedules filed by the regulated company.

As originally drafted, Section 5 of the Natural Gas Act did not contain the proviso which now forbids the Commission to raise rates. This fact disturbed many of the legislators who feared that a Commission which was given authority to regulate the price at which natural gas would be sold would have the power not only to fix a lower rate but also a higher rate which would be so high that the public would use coal in lieu of gas. In a discussion of the proposed act on the floor of the United States Senate the following colloquy took place (81 Cong. Rec. 9314):

> Mr. Connally. Does the bill give to the Commission the power to fix the price at which the gas shall be sold?
>
> Mr. Wheeler. At wholesale.
>
> Mr. Connally. Does it require the companies to sell at those prices?
>
> Mr. Wheeler. It regulates the wholesale prices of gas.
>
> Mr. Connally. If a man should produce gas in my State and ship it in interstate commerce, then he would have to sell it at the price fixed by the Commission?
>
> Mr. Wheeler. Exactly; at the wholesale price fixed by the Commission.
>
> Mr. Connally. The power to fix a low price involves the power to fix a high price.
>
> Mr. Wheeler. Yes.
>
> Mr. Connally. The coal companies are opposed to the use of natural gas and oil, and are always fighting its use. With a commission such as the Interstate Commerce Commission controlling these matters, does not the Senator believe there would be tremendous pressure to put the rate probably so high that the public in the coal areas would use more coal and less gas?

Mr. Wheeler. I do not think so. I think we have to give credit to the Commission and say it would act honestly.

Mr. Connally. I am not talking about honesty. They may think that a sound economic policy, just as the Senator thought it was a sound economic policy when he voted for the coal bill to raise the price of coal.

If the price of coal was raised by passing a bill here having that effect, could not the Interstate Commerce Commission under the provisions of this bill say "We think the price of gas ought to be higher? It is cleaner and nicer and better, and ought to cost a great deal more than coal. Therefore we will raise these prices and put them so high that very few people can afford to use gas." * * *

This problem was also duly considered in the House as is apparent from the following discussion (83 Cong. Rec. 9101):

Mr. Lea. Mr. Speaker, I offer the following motion, which I send to the desk.

The Clerk read as follows:

Mr. Lea moves that the House concur in the amendment of the Senate to section 5(b) of the bill, on page 8, line 8, with an amendment: On page 8, line 8, in lieu of the matter inserted by the Senate amendment insert the following: '*Provided*, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.'

The Speaker. The question is on agreeing to the motion offered by the gentleman from California.

Mr. Lea. Mr. Speaker, this amendment was authorized by the committee.

Mr. Faddis. Mr. Speaker, will the gentleman yield?

Mr. Lea. Yes.

Mr. Faddis. That amendment provides that a gas company may apply for an increase in rates by filing a schedule.

Mr. Lea. It provides that the rates shall not be made higher than the schedule asked for by the company. *The purpose of the Senate amendment was to prevent any company's rates being raised over their objection, with the idea of stifling competition with a competitor.* This means that the rates of the gas company will not be raised higher than their schedules.

The Speaker. The question is on agreeing to the motion of the gentleman from California.

The motion was agreed to.

In order to enable the pipeline companies to adjust rates involving the sale of gas for resale for industrial use with the greatest flexibility under competitive conditions, the Act provides in Section 4(e) that the Commission shall not have authority to suspend rate changes for such service.

This Court has determined that the Commission may not use its rate powers to discourage the sale of gas which is in competition with other fuels. In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 615, 616 (1944), Mr. Justice Douglas, speaking for the Court, stated:

> But it is said the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial

> uses should be discouraged. * * * [W]e fail to find in the power to fix 'just and reasonable' rates the power to fix rates which will disallow or discourage sales for industrial use. * * *[1]

The effect of the Federal Power Commission's action in foreclosing Transco from competing with the coal industry in supplying firm service to steam electric generating stations is to leave the coal and railroad interests in control of that market.

We have shown in our discussion above (Part III B) that Congress never intended that the Commission use the certificate provisions of the Act for the purpose of suppressing competition between fuels to effect general conservation. The Commission itself has in the past recognized that no fuel supplier is entitled to a monopoly of the markets which it serves. Thus in authorizing the construction of Transco's original transmission system in 1948, the Commission refused to recognize any exclusive right upon the part of Texas Eastern Transmission Corporation to serve the Philadelphia-New Jersey area. The Commission found:

> It is manifest that Texas Eastern seeks to obtain a monopoly of the natural gas markets in the Middle Atlantic Seaboard area. We cannot subscribe to the thought that Texas Eastern is entitled to preempt such markets or that recognition of such prospective monopoly is in the public interest. It is therefore concluded that the position taken by Texas Eastern is without merit. *Trans-*

[1] The United States Court of Appeals for the Tenth Circuit similarly held that the "effect of a gas rate upon a competing fuel industry is not a factor which under the Act the Commission may consider in a proceeding for the establishment of a gas rate." *Alston Coal Co.* v. *Federal Power Commission*, 137 F. 2d 740, 742 (10th Cir. 1943).

Continental Gas Pipe Line Company, Inc., 7 F.P.C. 24, 44 (1948).

B. The Commission May Not Ignore the Intent of Congress as Expressed in the Antitrust Laws.

Prior to federal regulation in 1938, the interstate natural gas pipeline industry was heavily concentrated in the hands of a few holding companies.[1]

Apprehensive of the practices and power wielded by these holding companies, Congress inserted in Section 20(a) of the Act the following provision:[2]

> The Commission may transmit such evidence as may be available * * * concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

While it is clear that the Federal Power Commission has not been given the power by statute to enforce the federal antitrust laws, *McLean Trucking Company* v. *United States*, 321 U.S. 67, 79 (1944), the Commission may not ignore those laws. In *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (D.C. Cir. 1956), a case involving competition between barge owners transporting petroleum products on the Mississippi and Ohio rivers and a natural-gas company proposing to convert a natuarl gas pipeline into a products pipeline, the Court of Appeals stated:

> Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right

---

[1] See *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 665 (1941); *United States* v. *Columbia Gas & Electric Corp.*, 36 F. Supp. 488 (D. Del. 1941).

[2] 15 U.S.C. § 717t.

to consider a Congressional expression of fundamental natural purposes as bearing upon the question whether a particular certificate is required by the public convenience and necessity.

If Transco were to enter into an agreement with the coal and railroad interests to divide the East Coast fuel market, giving to the coal and railroad interests the market for boiler fuel in the steam electric generating plants and giving to the pipeline company the house-heating market, the pipeline company, despite its public utility status, might well be charged with a violation of the federal antitrust laws for this division of market.[1]

If Transco attempted to enter into an agreement with other purchasers of natural gas which would deliberately limit the number of potential purchasers of natural gas in the field, as the Commission has done by denying Con Edison direct access to gas in the field, such action would probably be deemed a violation by Transco not only of the Federal antitrust laws[2] but also the antitrust laws of the State of Texas.[3]

---

[1] *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Allen Bradley Co.* v. *Local 3, International Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

[2] *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898), modified 175 U.S. 211 (1899).

[3] Article 7428 of the Revised Civil Statutes of Texas provides as follows:

Conspiracies Against Trade.

Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter

Lacking power to allocate the natural gas reserves of the United States, the Commission does not have the power to suppress competition between potential purchasers.[1] Lacking power to regulate all of the fuels used to serve industry, the Commission may not allocate the markets for competing fuels as it is unable to protect the public interest by regulating the price and service of the fuel supplier which would be left in control of the market. Even assuming that the Commission, as a result of its enforcement of the Natural Gas Act, somehow acquired adequate knowledge of the problems of fuels other than natural gas, the "expertise possessed by an administrative agency * * * does not empower it to rewrite the laws which it has been charged with enforcing. This is a function of Congress."[2]

The Natural Gas Act was designed primarily to "protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

---

into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with any goods, wares, merchandise, articles or products or any other person, firm, corporation or association of persons.

[1] Repeals of the antitrust laws by implication are not favored. *Georgia* v. *Pennsylvania Railroad*, 325 U.S. 439, 456-57 (1945).

[2] *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 374 (2d Cir. 1958).

This protection was provided by statutory provisions designed to remove rate and service preferences and discriminations by the pipeline companies and to establish standards to assure that the rates charged were just and reasonable by public utility standards. It is inconceivable that Congress having such purposes in mind ever intended that the Natural Gas Act would be enforced in such manner that it would permit another fuel than natural gas to exploit consumers.

The record evidence shows that natural gas not only has the great value of suppressing air pollution in New York City, but it also would enable Con Edison to generate electricity at a cost to itself and, consequently, to its consumers, which would be lower than would be the case if coal or oil were used (R. 33a, 102a).

Transco is seeking the assistance of this Court in permitting it to compete with other fuels in serving the requirements of the highly populated and heavily industrialized areas which it serves. By denying Transco this right to compete, the Commission has departed from the purposes of the Natural Gas Act and arbitrarily and capriciously suppressed competition contrary to the intent of Congress evident in the federal antitrust laws.

V.

THE COMMISSION HAS REFUSED TO GIVE PROPER CONSIDERATION TO THE INTENT OF CONGRESS AS EXPRESSED IN AIR POLLUTION LEGISLATION.

One of our most precious natural resources is the envelope of atmosphere surrounding the earth, providing us with the air we breathe and maintaining the animal and vegetable life upon which we depend. It is not replaceable. There is no substitute for it. We

cannot afford to have it polluted to any great degree.

For many years the municipal authorities of the cities in the heavily populated, highly industrialized areas of our country have shown increasing concern over air pollution caused by the discharge of contaminants into the atmosphere which have a deleterious effect upon persons and property (R. 39a). This anxiety over air pollution has been sharpened by the knowledge that the prolonged presence of a blanket of contaminated air over a city can bring about the death of residents unfortunate enough to be living in the locality. An adverse change in atmospheric conditions can change a tolerable situation into an eye-stinging, lung-irritating and even lethal smog within a fairly short time.[1]

---

[1] The Comissioner of the Department of Air Pollution Control of the City of New York testified (R. 53a-54a):

> The Federal Power Commission and other governmental agencies are justly concerned with the nation's natural resources, and we must not overlook the fact that the very air we breathe is perhaps our most precious natural resource. This is not replaceable. We live in an envelope of air, and we cannot afford to have our atmosphere become polluted to any great degree. The ingenuity of man can find and develop many sources of power and many sources of food, but there is no substitute for the atmosphere in which we live and work. Air pollution can not continue to remain an uncontrolled problem. Depletion of this natural resource must be avoided at all costs.
>
> And may I add that with the greater increases in population which are taking place in our country today, population increases at the rate of approximately 3,000,000 persons a year, the increase in urbanization which is taking place, the increase in the consumption of electric power—I have forgotten exactly what the average figure is, I think electric power has increased some 43 or 45 per cent in the last four or five years—I think under the conditions we have to realize that with these factors changing and the increase in indus-

The City of New York has established a Department of Air Pollution Control as part of its program to eliminate the health hazard caused by air pollution of the atmosphere over the City of New York. The Commissioner of this Department, Dr. Leonard Greenburg, an eminent physician, health authority and engineer, appeared as a witness in the proceedings before the Commission involving the X-20 service to urge the Federal Power Commission to authorize the transportation service, as a firm supply of natural gas was the only practical solution to the air pollution problem caused by Con Edison's Waterside Station and its East River Station (R. 50a). Dr. Greenburg, voicing the concern of the municipal authorities, stated (R. 54a):

> We have considered this problem at great length, we live with it each day, and a good part of the night, and have for a long time. And as a result, we are firmly convinced that the health and comfort of the citizens of this city, including not only those in the immediate vicinity of these power plants, but those further away as well, requires the consent of [the Federal Power] Commission to the transportation of gas for use in these power plants.

---

trialization, we must be exceedingly careful or more and more cities of our country will overstep the bounds of reasonable limits of air pollution, and then when meteorological conditions turn against us on some occasions, as they have in Los Angeles, we are going to be in serious trouble.

I might also mention that when this happened in the City of London, England, 4,000 people died in a period of about two weeks. This can happen other places, and this is something which requires long-range planning; and it is in terms of this which I, as Commissioner of Air Pollution of the City of New York, am now thinking and trying to transmit to your Commission.

> If the Federal Power Commission wishes to aid the people of the City of New York, and at the same time carry out the expressed intent of Congress in the reduction of air pollution, the approval of the use of gas as requested in the proceedings being heard here is one of the most significant ways in which the Commission can make a constructive contribution to the welfare of the people of New York City.

Dr. Greenburg admitted that the state of knowledge in the health field in air pollution is still in its learning stages, but he indicated that what is now known gives no reason for complacency (R. 48a):

> [S]ome information is emerging, and aside from the nuisance aspects which have been verified on numerous occasions by our staff, we believe that the health implications inherent in the continued exposure to mixtures of soot, flyash and sulphur dioxide gas, which are continually emitted by these power plants, is something to be regarded with suspicion. There is mounting evidence from many sources that exposure to a mixture of such dust and sulphur dioxide can cause marked irritation of the respiratory tract, and obviously, an official agency such as ours cannot be blind to the health implications which are inherent in this situation. * * *

Dr. Greenburg agreed quite substantially with the findings of the Interstate Sanitary Commission appearing in its February 1958 report on the state of smoke and air pollution in the New York-New Jersey metropolitan area (R. 40a). This Commission stated (R. 40a):

> Pollution is an irritating nuisance for millions of inhabitants of the area and, in addition, brings about numerous more harmful effects.

Economic losses caused by air pollution in the New York-New Jersey metropolitan area are numerous. Pollution results in damage to buildings and structures, painting, finishes, textiles, vehicles, clothing, and many other items. Cleaning costs in the area are increased to a major extent by air pollution and its effects.

Health may be adversely affected, especially in persons liable to asthma and certain lung impairments. At least a suspicion exists that air pollution may be a contributor to the increase in lung cancer and some forms of heart disease.

Aircraft flights into and out of the New York-New Jersey metropolitan area are hampered by poor visibility brought about by air pollution. Pollution thus increases potential hazards at some of the world's busiest and largest airports.

To show the interest of the Congress of the United States in the air pollution problem, Dr. Greenburg referred to the enactment in July, 1955, of Public Law 159 authorizing the United States Public Health Service to engage in air pollution control activities and authorizing the expenditure of substantial sums in support of its activities (R. 39a). The federal Air Pollution Control Act contains a declaration of policy reading as follows:[1]

> In recognition of the dangers to the public *health* and welfare, injury to agricultural crops and livestock, *damage to and deterioration of property*, and *hazards to air* and ground *transportation, from air pollution*, it is declared to be the *policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution*,

[1] 69 Stat. 322, 42 U.S.C. § 1857.

> to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of the air pollution abatement research programs. To this end, the Secretary of Health, Education, and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) shall have the authority relating to air pollution control vested in them respectively by this chapter

This policy is to be effected through research programs and joint investigation undertaken by the Surgeon General after careful investigation and in cooperation with other Federal agencies (including apparently the Federal Power Commission), with State and local government air pollution control agencies, with other public and private agencies and institutions, and with the industries involved.[1] The purpose of such research and investigation is to eliminate or reduce air pollution.[1]

To finance this program, Congress in 1955 authorized the appropriation to the Department of Health, Education and Welfare for each of the five fiscal years beginning July 1, 1955, and ending June 30, 1960, not to exceed $5,000,000.[2] Congress subsequently

---

[1] 42 U.S.C. § 1857a.

[2] 42 U.S.C. § 1857d. Some indication of the relative concern of Congress over air pollution might be obtained by contrasting the appropriations of $5,000,000 per annum under the Air Pollution Control Act with the total appropriation to the Federal Power

extended this program until 1964.[1]

The Federal Power Commission argues that it is entitled to consider a wide variety of factors in determining public convenience and necessity in a certificate proceeding in an effort to justify its denial of a certificate to Transco. We have shown above that this argument has been used as a disguise for an attempt to allocate the natural gas reserves of the United States, as the court below has shown. But when it comes to matters of air pollution, the Commission is concerned with matters which we submit it must consider. It cannot be assumed that while it was authorizing the Surgeon General to undertake a giant air pollution control program, Congress intended that the Federal Power Commission would consider itself free to undo such efforts by denying to a utility in New York City the only means by which air pollution caused by sulphur dioxide can be eliminated. Utili-

Commission for the Fiscal Year 1959 of $6,932,500, when it is remembered that the Commission regulates one of the largest industries in the country. See 39 F.P.C. Ann. Rep. 6 (1959).

[1] The Air Pollution Control Law was amended to extend the period during which it would be in effect until June 30, 1964. The Act was also amended by adding a new section reading as follows (73 Stat. 646, 42 U.S.C. § 1857g):

> It is declared to be the intent of the Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare, and with any interstate agency or any State or local government air pollution control agency in preventing or controlling the pollution of the air in any area insofar as the discharge of any matter from or by such property may cause or contribute to pollution of the air in such area.

zation of oil in lieu of coal would eliminate the fly ash, but not the sulphur dioxide.[1]

Congress did not decline to initiate a modest air pollution program through enactment of the Air Pollution Control Act because such a program alone could not eliminate air pollution. In discussing the need for air pollution legislation at the time Congress was considering the extension of the Act beyond June 30, 1960, the House Report states:

> In 1955, when Public Law 159 was enacted, it was clear that air pollution as a national problem was growing faster than our Nation's knowledge of how to control it. Today, the problem is still with us.
>
> * * *
>
> Valuable information has been provided about the extent of air pollution in the United States, and about practical means of measuring, assessing, and controlling air pollution.
>
> Data have been developed about many ways in which air pollution subtly affects human health, including specific knowledge about the effects of agents such as ozone and sulphur dioxide, which are directly toxic and physiologically damaging, and certain olefin compounds which can cause eye irritation in humans and serious toxic effects in experimental animals.[2]

In discussing the type of medical research undertaken by the Public Health Service, the Report states:

> Medical research is concerned not only with those well-known acute air pollution episodes which re-

---

[1] While the sulphur content of the coal used at Waterside runs about 1.75 per cent, the sulphur content of the oil used runs between 2.5 and 3.0 per cent (R. 74a).

[2] House Report No. 960 to accompany H.R. 7476, 86th Cong., 1st Sess., August 20, 1959.

sulted in sudden death—ranging from 20 fatalities in Donora (1948) to 4,000 or more in a single week in London (1952)—but also with the potentially greater problem of long-term cumulative injury to community populations from day-after-day exposure to air pollution.

Realizing the magnitude of the problem, Congress obviously considered any contribution to its alleviation a matter of grave public interest. The casual evaluation of the Presiding Examiner[1] and the Commission[2] in the presence of this serious air pollution problem, shown on this record, is in sharp contrast with the positive action of Congress, in the face of this growing problem. The evidence of record, which is unrefuted, amply demonstrates (1) the existence of a great public interest in the alleviation of air pollution and (2) that the X-20 service will make a substantial contribution to the reduction of air pollution conditions in the City of New York, with the concomitant benefit to the health of the inhabitants and their economic betterment.

---

[1] "The record in this case does indicate that Consolidated Edison should do something about these annoying smokers • • •" (R. 173a)

[2] "• • • the idea of ameliorating a smoke condition found unpleasant and annoying by the workers in a unique facility, the United Nations headquarters building, is an attractive one • • •" (R. 181a).

"Contrary to the allegations of the companies, we did consider the matter of air pollution as one of the elements of public convenience and necessity. However, we conclude that, although air pollution exists in New York City, as it does in many metropolitan areas, the evidence falls short of establishing that the volumes of gas here in question in Consolidated Edison's boilers would remedy the air pollution in New York City generally in sufficient measures to offset the detrimants of the X-20 service • • •" (R. 192a).

VI.

COAL PETITIONERS AND AMICI GAS UTILITIES.

A. Coal Petitioners Are Interested Solely in Serving Their Own Economic Interests.

The burning of large quantities of coal belches huge quantities of flyash and sulphur dioxide into the atmosphere breathed by the densest population in the world. Coal is an "inferior" fuel in Con Edison's stations on Manhattan Island.

Coal intervenors play the "conservation"[2] theme in an effort to exclude as much natural gas as possible from the present general fuel market. They are not willing that natural gas compete with them on equal terms. They want to invoke the strong arm of the Federal Power Commission to stifle natural gas competition completely. But Congress very specifically intended that natural gas should *not* be subjected to any disadvantage in its competition with coal or any other competitive fuel. Its unequivocal intent was that the regulation of natural gas should not impede it in *free competition* with other competitive fuels, particularly in the industrial market. This was one of the basic purposes in excluding Commission jurisdiction over direct sales, *i.e.*, sales not for resale under Section 1(b).[1] Further evidence of congressional intent in

---

[1] The reason for this exclusion was given by Dozier A. DeVane, Solicitor of the Federal Power Commission, when he appeared before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 11662, a predecessor of the Natural Gas Act. In a brief submitted to the subcommittee, Judge DeVane stated:

> • • • The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company, this function being purely local in character, nor is any attempt made to exercise control over distribution facilities. *Likewise natural*

this respect is found in the proviso contained in Section 5(a) of the Act which reads as follows:[2]

> *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; * * *.

The legislative history of this provision makes its purpose eminently clear. Congressman Lea, the manager in the House of the bill which became the Natural Gas Act, stated (83 Cong. Rec. 9101):

> Mr. Lea: It provides that the rates shall not be made higher than the schedule asked for by the company. The purpose of the Senate amendment was to prevent any company's rates being raised over their objection, *with the idea of stifling competition* with a competitor. This means that the rates of the gas company will not be raised higher than their schedules.

---

gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest. In short, this subsection [1(b)] limits the exercise of authority to only those interstate activities *which involve natural gas intended for ultimate distribution to the public,* as that phase of its activities places the natural-gas company in the status of a public utility, enjoying a monopolistic position subject to regulation in the public interest. That Congress alone may undertake such regulation is established by *Missouri* v. *Kansas Natural Gas Co., supra,* [265 U.S. 298 (1924)]. Hearing on H.R. 11662, 74th Cong., 2nd Sess., p. 17 (1936).

[2] For a more complete discussion on this point, see Part IV, *infra*

B. Amici, Southern California Gas Company and Southern Counties Gas Company of California, Are Seeking to Preserve Their Market From Competition by Other Sources of Natural Gas.

The position of these *amici* is, to say the least, ironical. As observed by the Commission,[1] each of these companies purchases natural gas from the California gas fields directly, and also through their parent, Pacific Lighting Corporation.

Neither of these companies has any aversion to the use of gas for boiler fuel in generating stations.[2]

A completely adequate response to these *amici* is found in the facts set forth in footnote 7 at page 15 of their Brief in the lower court, which footnote we set forth in full below.[3]

---

[1] See page 38, *supra*, footnote 18.

[2] Almost 25% of the gas sold by the Pacific Lighting system was used for this purpose in 1959. See page 70, *supra*.

[3] A step taken by the Southern California Companies about three years ago would appear to be inconsistent with the position taken in this proceeding but it is distinguishable. On October 27, 1956, they entered into an agreement with the Southern California Edison Company and their interstate pipeline supplier, El Paso Natural Gas Company, by which El Paso would make a direct sale of gas to the Edison Company at the California border. The Southern California Companies would accept this gas at the border and deliver equivalent quantities to the Edison Company steam plants by exchange. The Southern California Companies would receive an exchange fee and benefit from this exchange arrangement by acquiring the right to purchase a portion of this gas during the winter months. Certification of this project was recommended by the Federal Power Commission Examiner. *El Paso Natural Gas Company*, FPC Docket G-12580, Presiding Examiner's Decision, May 12, 1959.

It is important to emphasize that, at the time the Southern California Companies entered into this exchange agreement the

In the project so apologetically referred to, El Paso Natural Gas Company contracted to sell 100,000 Mcf per day, with minor interruption, to Southern California Edison Company exclusively for boiler fuel use, delivery to be made at the Arizona-California state line. Originally, *amici* were to transport this gas to Southern California Edison's plants in California. The Commission was persuaded to compel El Paso to sell the gas to the *amici* instead of to Southern California Edison.[1] Thus Southern California Edison has lost a competing interstate source of gas. *Amici* buy the 100,000 Mcf per day from El Paso but are free to resell it to Southern California Edison. But when the gas thus changes hands there are still 100,000 Mcf per day available for boiler fuel. *Amici* have expressed no qualms whatsoever over this state of affairs.

---

clear-cut federal policy, enunciated in this Transco certificate case, did not exist. The Southern California Companies had tried unsuccessfully for a year to work out a satisfactory sales arrangement for delivering gas to the Edison Company's steam electric plants. When it became evident that the Edison Company was not only capable but ready to build its own pipeline to connect with an out-of-state gas supplier, the exchange arrangement became the last practical recourse for the two Southern California Companies. The Southern California Companies believed that this arrangement was manifestly preferable to the Edison Company's construction of an independent pipeline devoted to its exclusive use of the total gas involved since the exchange agreement provided additional volumes of gas during winter periods when needed for firm gas customers.

[1] *El Paso Natural Gas Company*, 22 F.P.C. 900 (1959).

Thus large volumes of boiler fuel gas are made available in Florida,[1] California[2] and Chicago[3] at approximately the same time Transco is denied authority to deliver gas in New York to suppress air pollution.[4]

VII.

THE REMAND OF THE COURT OF APPEALS WITH DIRECTIONS TO ISSUE THE CERTIFICATE WAS PROPER.

The Court of Appeals ruled—properly as we have shown *supra*—that the Commission had erred in refusing to issue a certificate on the basis of five factors or "policy considerations". Since elimination of these considerations left the case on the record before the Commission and the Court on the conventional requirements for the issuance of certificates and in its opinion the Commission had found that these requirements had been satisfied, the Commission's administrative function in this regard had already had the opportunity for full play.

The only issue raised in the administrative proceeding not decided by the Commission in its order related to appropriate rates for the transportation of the displaced gas.[5] But as noted by the court below, the

---

[1] 16 F.P.C. 118 (1956).

[2] 19 F.P.C. 393 (1958).

[3] Midwestern Gas Transmission Company, 21 F.P.C. 653 (1959).

[4] See Part III C, *supra*.

[5] These are the volumes of gas that would be transported by Transco to make-up the volumes of undelivered transportation gas which accumulated during such periods as the X-20 service was interrupted when Transco would deliver peak service gas to Con Edison. See footnote 1, page 20, *supra*.

Commission's brief to that court had conceded that "the Commission did not rely upon that deficiency as a ground for denying the certificate. Had the Commission otherwise been able to grant the certificate, it would presumably have remedied the defect by a condition" (R. 309, fn. 2). Since the remaining issue was thus not of controlling weight, it was eminently proper for the court below—the Commission's administrative responsibility being otherwise entirely exhausted—to remand the case "with directions to issue the certificate applied for, subject to further hearing on the minor question of rates" for the transportation of the displaced gas (R. 325).

Implicitly conceding that such was the state of the record before the Commission and the court below in deciding the case, the Commission, nevertheless, claims that the remand was improper since, according to the Commission, there are at least three areas in which it might now wish to make further inquiry. One is that subsequent physical additions to Transco's pipeline facilities authorized by the Commission make it impossible to apply, literally, the mandate of the court below to issue ". . . the certificate applied for . . ." Secondly, it is said that another hard look at the X-20 contract or rate schedule might result in the attachment of conditions, requiring some modification of the arrangement. And, third, it is said that with the passage of the time involved in this appeal, Con Edison has received additional authorized deliveries of firm jurisdictional gas which may now make the X-20 service unnecessary.

None of these alleged bases will support the claim that an entirely new appraisal must be made of the X-20 project.

1. While this case worked its way to final decision, the expanding requirements of Transco's customers had to be met and new facilities had to be added to Transco's pipeline to meet these added requirements. Since the pipeline facilities identified with the X-20 service on the record below constituted the next logical addition to the Transco system, Transco, when it filed its 1959 expansion application in FPC Docket No. G-16603 temporarily identified in that proceeding the facilities which it must install to give it the capacity required by service proposed in Docket No. G-16603 assuming (1) the X-20 service and facilities were never authorized in Docket No. G-13590, and (2) the X-20 service and facilities were subsequently authorized in Docket No. G-13590. As the question whether the X-20 service would be authorized was pending in this Court at the time the Commission took up final consideration of Transco's proposal in Docket No. G-16603, the Commission authorized Transco to construct facilities on the first assumption, *viz.*, that the X-20 service and facilities would never be authorized in Docket No. G-13590. The Commission reserved decision on the second alternative pending final action by this Court. See *Transcontinental Gas Pipe Line Corporation*, 22 F.P.C. 836, 840 (1959). In other words, if the Commission were to issue a certificate tomorrow authorizing the X-20 service and the facilities associated with it, the only further administrative action required by the Commission involves consideration of the reserved issue in Docket No. G-16603 which relates solely to the further facilities required to provide the service proposed in Docket No. G-16603. Therefore, no further proceedings are required in Docket No. G-13590 relating to facilities required to render the proposed X-20 service.

2. Secondly, the Commission argues that it should "at least" be permitted to take a second look at the proposed rate schedule (or contract) between Transco and Con Edison in order to consider the "desirability of modifying" it through its conditioning powers. While, not a whisper of fault with the rate schedule appears either in the Commission's opinion, or in its order denying rehearing, the Commission now seeks to excuse itself from this alleged oversight "since it denied the certificate outright, . . . [there was] . . . no reason for discussing the possible need for conditions." (Com. Br., p. 85, fn. 2)

The difficulty with this suggestion is that there is nothing in the record made before the Commission which even suggests any question about this rate. Neither the Staff nor any of the intervenors raised any issue in this regard. Indeed, the Public Service Commission of the State of New York which actively participated in the proceeding deligently pursued public interest aspects in other elements of the consolidated proceedings, but that Commission did not oppose or question the X-20 service or the terms of the rate schedule.

In contrast to this alleged oversight, it is significant that even though the Commission denied the certificate, it noted the existence of a question as to rate for the displaced gas. In view of the unimportance of this matter as compared to the rate for the transportation gas itself, it is hardly likely that the Commission would have overlooked any problem as to the transportation rate if it thought any such problem exists. The Commission's present suggestion in this respect seems to be merely a make-weight invoked solely to buttress its position, without, however, having any substantiality in fact.

3. Finally, it is suggested that Con Edison "no longer needs all of the X-20 gas at its Waterside Station." (Com. Br., p. 86). The Commission shows that in 1959, 10,400 MMcf of gas were consumed at Waterside which was made available through other purchases from Transco. The point is that such gas as is currently available through other purchases is "valley" gas, available only during warmer periods of the year, or available only because Con Edison's firm requirements have not yet built up to the point where such gas is required for firm resale service. This latter circumstance occurs because Con Edison may have committed itself to purchase firm resale gas from Transco in anticipation of firm requirements or because firm resale requirements have not built up quite as rapidly as forecast. However, all such valley gas is committed to firm resale requirements (R. 107a) and its temporary diversion to the Waterside plant does not solve the air pollution problem. What Con Edison needs to solve this problem is a firm service for the Waterside Station on a long-term basis at a fixed price. The valley gas that might be available today, but not tomorrow, has none of these features.

In addition to the fact that the Commission's objections to the remand order are without foundation and highly strained, it is important to bear in mind that the Commission itself has on several occasions adverted to its enormous backlog and the difficulties it has in processing applications expeditiously.

In contrast, in a growing dynamic industry such as the natural gas industry, administrative delay can kill a proposal as effectively as outright denial of the application or certificate sought.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JAMES B. HENDERSON
WILLIAM N. BONNER, JR.
3100 Travis Street
Houston, Texas

THOMAS F. BROSNAN
821 Fifteenth Street, N. W.
Washington 5, D. C.

Of Counsel

RICHARD J. CONNOR
JOHN T. MILLER, JR.
821 Fifteenth Street, N. W.
Washington 5, D. C.

Counsel for Respondent
Transcontinental Gas
Pipe Line Corporation

October, 1960.

APPENDIX A

Gas Facts

A STATISTICAL RECORD OF THE GAS UTILITY INDUSTRY IN 1957
AMERICAN GAS ASSOCIATION — BUREAU OF STATISTICS

SECTION II

Energy Reserves

Proved recoverable reserves of natural gas increased by 8.5 trillion cubic feet during 1959, in spite of net production of 12.4 trillion cubic feet, to a new peak of 262.6 trillion. During the past five years gross additions to proved natural gas reserves have aggregated 106.7 trillion cubic feet, equivalent to 1.89 times net production during the same period.

• • •

The favorable ratio of incremental new reserves to annual production greatly minimizes the significance of the "number of years supply available," frequently computed by dividing total proved recoverable reserves by annual withdrawals. As long as new additions exceed production there need be little cause for concern about such an hypothetical ratio. A number of geologists and industry research personnel have made estimates of total ultimate recoverable natural gas reserves. Several such recent analyses have developed estimates in the neighborhood of 1,400 trillion cubic feet, while one specified the realistic possibility of 1,700 trillion cubic feet.

Estimates of proved recoverable reserves of natural gas, natural gas liquids, and crude oil are developed by the A.G.A. Committee on Natural Gas Reserves, the A.P.I. Committee on Petroleum Reserves, and numerous subcommittees of both groups. The men who participate represent the most highly qualified petroleum engineers and geologists available, with each individual having a high degree of detailed knowledge of the specific and limited geographic area for which he is responsible. Through the years the estimates have been widely accepted as the most authoritative statement of proved recoverable reserves.

TABLE 5

SUMMARY OF ANNUAL ESTIMATES OF NATURAL GAS RESERVES, 1946 - 1959

Note: Volumes are calculated at a pressure base of 14.65 psi, absolute, and at a standard temperature of 60°F.

(Millions of Cubic Feet)

Year	Natural Gas Added During Year: Extensions and Revisions	Natural Gas Added During Year: Discoveries of New Fields and New Pools in Old Fields	Natural Gas Added During Year: Total of Discoveries, Revisions and Extensions	Net Change in Underground Storage	Net Production During Year	Estimated Proved Reserves of End of Year	Increase over Previous Year
1946-1950 avg.[a]	8,643,487[b]	3,757,370[b]	13,466,516	62,843[c]	5,943,555	173,269,240	7,560,667
1952	8,934,470	5,411,043	14,345,513	198,850	8,639,638	199,716,225	5,904,725
1953	13,371,355	7,081,661	20,453,016	516,431[d]	9,238,540	211,447,132	11,730,907
1954	4,632,309	4,966,894	9,599,203	90,906	9,426,509	211,710,732	263,600
1955	16,298,125	5,719,069	22,017,194	87,637	10,118,118	223,697,445	11,986,713
1956	19,214,604	5,636,476	24,851,080	133,970	10,907,926	237,774,569	14,077,124
1957	11,118,319	8,998,993	20,117,312	179,733	11,502,359	246,569,255	8,794,686
1958	13,388,808	5,611,098	18,999,906	57,902	11,485,026	254,142,037	7,572,782
1959	14,933,109	5,800,749	20,733,858	161,326	12,440,628	262,596,593	8,454,556

a. Components do not add to totals because some are based on three, some four, and some five year averages.

b. Four year average; 1946 data not available.

c. Three year average; 1946-1947 data not available.

d. All native gas in storage reservoirs formerly classified as a natural gas reserve is included in this figure.

Source: A. G. A. Committee on Natural Gas Reserves.

Note: For earlier years please refer to Table 4 in the Historical Statistics of the Gas Industry.

APPENDIX B

Leonard Greenburg

was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Howley:

Q. Will you kindly state your name and address? A. My name is Leonard Greenburg. My address is 44 West 77th Street, New York City.

Q. Will you state what at the present time is your official position? A. Well at the present time I am Commissioner of the Department of Air Pollution Control of the City of New York. Originally I was appointed to this post in 1952 by the then mayor of New York City, and I have since been reappointed twice in accordance with the provisions of Chapter 47 of the New York City Charter, Section 1071 A, which sets forth the professional qualifications for this post and which I fulfill.

Q. Will you set forth, please, your education and the high points of your experience? A. Well, I am a graduate of the Columbia University School of Mines, Engineering and Chemistry, in 1915, with a degree of Civil Engineer, and subsequently I was a student at the Yale University Graduate School where I took a Ph.D. in Public Health; and subsequently in 1930 I took an M.D. at the Yale Medical School.

During the course of my professional life, I have engaged chiefly in public health activities of various kinds. I was in the United States Public Health Service for some 14 years. I was Health Commissioner of the City of New Haven for a year and a half. I specialized, while in the Public Health Service, in occupational disease prevention and industrial hygiene for the State of New York, and then in 1952 I took this present position as Commissioner of Air Pollution Control.

Q. Are you, in addition to being a licensed physician, also a licensed engineer? A. Yes, I am a licensed engineer, professional engineer, in the State of New York. My license number is 17465. That was obtained in 1937. And I am a licensed physician in the State of New York, license number 24875; and a licensed physician in the State of Connecticut, 203172.

Q. Will you state your university affiliations? A. Well, I have had, over the past many years, many university affiliations. For approximately 15 to 20 years I was on the teaching staff at Yale, and I finally finished up there in about 1945 as clinical professor of public health. Since that time in New York City I have been on the teaching staff at Columbia, and now I am on the teaching staff at New York University, and I am Visiting Professor at the Einstein Medical College.

Q. Will you touch upon, Dr. Greenburg, the more important of your professional affiliations? A. Well, I am a member of the Honorary Scientific Society, Sigma Xi, and the honorary public health society. I am diplomate of the American Board of Preventive Medicine and Public Health, and a diplomate of the American Board on Occupational Medicine; and a member of the American Medical Association. I have been a member of the American Society of, what was originally called, Heating and Ventilating Engineers for about, I think about, 25 or 30 years—no less than 25 anyway. I have been a Fellow of the American Public Health Association for many years, and I have been on the Board of Directors of the American Industrial Hygiene Association; on the Board of Directors of the National Society for the Prevention of Blindness.

And in addition to this, I have done some work and been on several committees for the World Health Organization, and at the present time I am a member of the New York State Board of Air Pollution Control which was recently set up by state statute.

Q. What is the general purpose of your appearance at this proceeding? A. Well, I appear before your Commission at the direction of the Mayor of the City of New York, the Board of Air Pollution Control with whom I have discussed this problem only last week, and the people of the City of New York, in order to urge approval of the request now before you of the Transcontinental Pipe Line Corporation for permission to transport certain amounts of natural gas for use within the City of New York for the generation of electric power and steam by the Consolidated Edison Company.

Now, I appear before you and present this testimony solely and completely in the interest of the control of air pollution in our city, and the urgent need for the reduction of air pollution by the Consolidated Edison Company. I have no other reason for being before your board.

Q. What are the broad problems of air pollution? A. Well, sir, throughout the United States the problem of community air pollution has been receiving increasing attention during the last ten years or more. Everyone, practically everyone, has heard of the smog problem of Los Angeles, but the fact is that Los Angeles is not by any means the lone sufferer from air pollution in our country. There are many cities which suffer from severe air pollution.

The Congress of the United States recognized the importance of this problem, and the 84th Congress, in July, 1955, passed a law authorizing the United States Public Health Service to engage in air pollution control activities, and authorized the service to spend the sum of not exceeding $5 million per year in pursuit of these activities. This is set forth in Public Law 159 of the 84th Congress.

Q. What is the effect of air pollution on your particular area, that is, in the City of New York? A. I would like to read for you another statement here, sir. As further evidence of the importance of air pollution control to the New

York City metropolitan area, I refer you to a very recent report dated February, 1958, just last month, published by the Interstate Sanitation Commission, entitled, "Smoke and Air Pollution—New York and New Jersey," in which the following statement is set forth:

> "Pollution is an irritating nuisance for millions of inhabitants of the area and, in addition, brings about numerous more harmful effects.
>
> "Economic losses caused by air pollution in the New York-New Jersey metropolitan area are numerous. Pollution results in damage to buildings and structures, painting, finishes, textiles, vehicles, clothing, and many other items. Cleaning costs in the area are increased to a major extent by air pollution and its effects.
>
> "Health may be adversely affected, especially in persons liable to asthma and certain lung impairments. At least a suspicion exists that air pollution may be a contributor to the increase in lung cancer and some forms of heart disease.
>
> "Aircraft flights into and out of the New York-New Jersey metropolitan area are hampered by poor visibility brought about by air pollution. Pollution thus increases potential hazards at some of the world's busiest and largest airports."

This report from which I have just quoted was a report prepared by the Interstate Sanitation Commission, and I regret that I did not bring copies with me. However, I can send them to the Commission. But this is a very recent and pretty intensive study of the problem in the New York-New Jersey area, and we agree with the findings of this report quite substantially.

Q. Becoming more specific, Doctor, what is the relationship of the problem of air pollution to the proceeding now being heard? A. Well, I think it should be borne in mind that the Consolidated Edison Company is essentially the power and steam source for our city. In all, the company operates 10 plants and provides more than 15 billion kilo-

watt hours of electrical energy and 20 billion pounds of steam for the use of the citizens of New York each year.

In general, we feel that the company has been moving on a progressive campaign of improvement in plant facilities and in the control of pollution from these plants. But there are two plants which do give us much concern.

Q. Which is the first of these two plants? A. The first of these is the Waterside plant situation at 40th Street and First Avenue in the Borough of Manhattan.

In general, most of the boilers at this plant are now removing approximately 97 to 98 per cent of the flyash produced by the combustion of coal before the discharge of stack gases. There are, however, two boilers, Number 71 and 72, which discharge their gases through a stack, known as the East Stack, which give us considerable concern, and I would like to talk about those for a moment.

Boilers 71 and 72 at the Waterside Station consume approximately 1,632,000 pounds of coal each day. This is in the form of pulverized coal. These boilers contribute 642 pounds of flyash to the stack gases each hour, an amount equivalent to about 15,000 pounds a day.

In addition to this tremendous contribution of flyash, these two boilers, 71 and 72, about which I am talking at the moment, release approximately 42,000 pounds of sulphur dioxide gas to the city's atmosphere.

Now, this is the crux of the problem so far as an air pollution man sees it with reference to the Waterside plant, and, in particular, Stacks 71 and 72.

Q. What about the location of the Waterside plant and the surrounding buildings? A. Well, this Waterside plant is situated in one of the most densely built-up areas of New York City, and probably of the world, I would think. In this area, there are located many of the City's finest office buildings, the United Nations' Building, Grand Central

Terminal, many of our important hotels, two of the very largest newspaper printing and publishing establishments in the United States, the Daily News and The Daily Mirror, and many foreign consulates and legations.

This area is now undergoing further very rapid development, and, although it is approximately only a half square mile in area, it, nevertheless, contains more than 66 buildings over 19 stories in height.

In addition, there are many large and small apartment houses located in the immediate vicinity of this power plant.

Q. Will you describe, Dr. Greenburg, what Exhibit 44 for identification purports to show? A. Well, this is a photostatic copy of Sections of the Manhattan Land Book published by the G. W. Bromley & Co., Inc., which we exhibit purely for the purpose of showing the location of the stacks of the Waterside plant with reference to the general buildings in the area and the nature of the build-up of the total area about which I referred to previously.

You will note that the Waterside plant is right along the river adjoining the Franklin Roosevelt Drive, on the right side of the plan, and the three stacks are numbered 1, 2 and 3. Then you will see, directly to the north, the United Nations' Headquarters, and the buildings in the whole area. You see the Grand Central Station on the left to the north, and the buildings in the whole area, particularly those which are outlined with heavy dash lines, which are the buildings, at the time the map was made and photostated, over 18 stories or more in height.

This will serve to give you a more concrete picture of the layout.

For example, a couple of blocks north of the Consolidated Edison plant, between Second and Third Avenue, you will notice the Daily News Building, and I believe a few blocks further north is the Daily Mirror, another one of our big newspapers.

The new Socony-Vacuum Building, you see, is on 42nd Street, between Third and Lexington Avenue.

Q. Why do you stress height, Doctor? A. I stress height because the stacks of the Consolidated Edison Company are high, in an effort to dissipate the discharges from the stacks, and the solid material, particularly, floats through the air at a high level before it comes down to street level, and gets in the windows of many of these tall buildings.

I think that the problems of air pollution are entirely different in a city where the buildings are low and widely dispersed than in a city like New York where the buildings are close together and the effluents from many stacks pollute the atmosphere.

Q. What is the second of the two plants that you made reference to before? A. Well, the other power plant which I would like to speak about is the East River plant. This is located on 14th Street, right along Franklin Roosevelt Drive. Here, too, the boilers are equipped with flyash removal equipment, which removes from about 96 to 97 percent of the flyash produced, but half of the boilers succeed in removing only 90 to 95 per cent.

In other words, there are some boilers there which are not doing an adequate job from our point of view, with the result that some 42,000 pounds of flyash are emitted each day to the air by this one station alone, and about 360,000 pounds of sulphur dioxide. And it is this that gives us our concern.

Q. Now, will you describe the neighborhood in which the East River plant is located? A. Well, as I pointed out before, this plant is located along the East River, south of the Waterside plant at about 14th Street. Immediately north are two very large low-cost public housing developments: namely the Lillian Wald houses, containing 16 buildings, 14 stories in height, and the 19 Jacob Riis Houses, mostly 14 stories in height.

Immediately to the west of the East River plant are the large privately-owned middle-income houses known as Stuyvesant Town and here there are 35 buildings more than 12 stories in height; and immediately to the north of the Stuyvesant Town is a Peter Cooper Village comprising 21 buildings over 15 stories in height.

Now, in all of these buildings together, there are some 14,800 families, and if you assume a rough average, which probably is not correct—but, as a rough average—it will give you an idea of the occupancy. You assume three people to an apartment, three people to a family, and you come up with a figure of about 45,000 persons living in the vicinity of the East River plant.

Now, in addition to this, somewhat further north but nevertheless affected by the stack emissions are the buildings of the new Veterans Hospital and Bellevue Hospital and Nurses' residence.

This Veterans Hospital is a tremendous edifice and the Bellevue Hospital complex is probably the largest or one of the largest hospital complexes in the United States. This is a hospital, nurses' home, the City Mortuary, the New York University buildings, and the Rehabilitation Center of Dr. Rusk, and all of these buildings together constitute, without any question, one of the great hospital complexes of the world. And this is right in the area which is affected by the East River plant.

Q. Is the area that you have just been describing depicted in a map which has been prepared under your supervision? A. Yes, we had a map of this area also. Yes, this is the one.

Mr. Howley: Mr. Examiner, would you like a large copy of this?

Presiding Examiner: I would rather deal with the small copy, please.

By Mr. Howley:

Q. Have you that map before you, Doctor? A. Yes, I have the map before me now.

Mr. Howley: May I have that marked for identification, Mr. Examiner?

Presiding Examiner: This is a photograph of a map bearing at the upper right-hand corner the legend, "The Source of Maps—Manhattan Land Book, City of New York —G. W. Bromley & Co., Inc., New York," and a further legend which begins "Part of Section 3—Plat 50," et cetera.

In the lower left-hand corner there is a legend saying, "Building Outlined are Ten Stories or Over—2/7/58."

This document will be marked for identification Exhibit 45.

(The map referred to was marked for identification as Exhibit No. 45).

By Mr. Howley:

Q. Would you, Doctor, please describe Exhibit 45 for identification? A. Well, this again, is a photostat of Manhattan Landbook made by the G. W. Bromley Company, Inc., the original map, and shows the location of the East River plant and its four stacks running alongside of the Franklin Roosevelt Drive, and the East River, and it shows outlined in dotted lines, dash lines, the buildings which are 10 stories in height or more.

I want to make it clear that these dash lines were added by us and not by the Bromley Company.

Now along the river you will see on the right side of the map the Lillian Wald Houses, the Jacob Riis Houses, and then you come to the Consolidated Edison station. And going a little further north you see a building of the Department of Plants and Structures of the City of New York, and on the left Stuyvesant Town with its many buildings. And

a little further north at Stuyvesant Town you will see the Veterans Hospital outline, the Bellevue Nurses Home and School, and then the remainder of the Bellevue layout is still north but not shown on the map here. I think there is really nothing more to add. The map, sir, is quite self explanatory.

Q. Coming back for a moment, Doctor, to the Waterside plant what, if you know, is the reaction of the nearby residents and business people? A. For many years our department and its predecessor departments have received bitter complaints from tenants and office workers in the vicinity of these plants concerning dust, flyash, soot and sulphurous odors. Some members of your Commission may even recall the seriousness of this situation at the time the 41-story United Nations headquarters building was under construction in 1950. This building is less than four blocks north of the Waterside plant. Mr. Trygve Lie, then Secretary General of the United Nations, characterized the gas and smog so bad as to create, and I am quoting now from a letter written by Mr. Trygve Lie, "a serious and potentially dangerous condition."

Recently Mayor Wagner received a petition from 1,855 tenants of the Tudor City buildings, a large group of apartment houses situated north of the Waterside plant, in which they complained about stack emissions from the Waterside plant. Concerning this problem, the local publication, "Tudor City View" published a letter and petition on page 8 of the November, 1957 issue, a portion of which reads as follows:

Well, may I just summarize it in a couple of words?

We sit in the office there in New York, and we naturally have many complaints that come in by telephone and some by mail. And the Mayor's office received this petition from the Tudor City people, and it was forwarded over to my office in due time, and we made investigations up at Tudor City, and we were convinced as a result of our investigations

on many occasions that this area was being polluted by fly-ash from the Consolidated Edison plant.

Irrespective of what anyone else said or did not say, this was our conclusion. So that we believe that there is no question about it, that the people in Tudor City, whoever they were or whoever made any complaints, had very reasonable and just cause for complaint.

By Mr. Howley:

Q. Very well, Doctor. What have you to say with respect to the health implication of emissions, stack emissions such as we are talking about? A. Well, in a health field in air pollution, there is a lot we still have to learn. There is no question about this. Many of us are trying to make investigations to learn more about the health aspects of the problem. But some information is emerging, and aside from the nuisance aspects which have been verified on numerous occasions by our staff, we believe that the health implications inherent in the continued exposure to mixtures of soot, flyash and sulphur dioxide gas which are continually emitted by these power plants, is something to be regarded with suspicion. There is mounting evidence from many sources that exposure to a mixture of such dust and sulphur dioxide can cause marked irritation of the respiratory tract, and obviously, an official agency such as ours can not be blind to the health implications which are inherent in this situation. And I do not think we are blind to it, and we are trying our best to keep abreast of developments in this field and to run down any leads we can which may be of significance.

Q. What action has your department taken to attempt to abate this nuisance? A. Well, this department, our department, the Department of Air Pollution Control, since it was first formed as an independent agency in '52, has brought continuous pressure on the Consolidated Edison Company in the courts and through official hearings to have the company take steps to reduce the stack emissions at its generating stations. In 1953, a long-range program of considerable

magnitude was formulated and agreed upon, whereby the Consolidated Edison Company would remodel its plants so as to provide the most modern mechanical and electrical precipitators for the removal of flyash from its stack gases. The cost of this program was at that time estimated to be approximately $44,000,000.

Q. What then has Consolidated Edison done, what steps has the company taken, in an attempt to meet this problem? A. Well, since January of '53, the company spent approximately $38,000,000 under this program, and in general we would say that the company is aware of its duty and responsibility for air pollution control.

Nevertheless, the expenditures of these funds will not produce an adequate reduction of the emissions from boilers 71 and 72 at Waterside, nor the emissions from the boilers at the East River plant, previously referred to as embracing not only the particulate matter such as flyash, but the huge tonnages of sulphur dioxide which are emitted as a result of the combustion processes.

The Consolidated Edison Company has expended approximately $3,600,000 for flyash control of the Waterside plant, but in spite of these substantial expenditures, the easterly stack at Waterside, which serves boilers 71 and 72, continues, as pointed out earlier, to emit an excessive amount of soot, smoke, flyash and sulphur dioxide. Our engineers advise us that this is not primarily due to the air pollution control equipment, but is due to combustion conditions inherent in these two boilers and that short of replacing them with entirely new boilers at a cost of approximately $12,000,000 and the expenditure of about four years' time, during which they would have to be taken out of service at least a good part of the time, there appears to be no other practical solution for the control of these boilers than the conversion of them to the use of natural gas.

The facts herein presented compel us to arrive at the above cited conclusion and, in view of our desire that this

problem be resolved and that these boilers be brought under control in as short a time as possible, we urge your Commission to grant to the Transcontinental Gas Pipe Line Corporation permission to provide the necessary transmission facilities to the Consolidated Edison Company for the delivery of this gas at the Waterside and East River stations.

Q. Now if natural gas were used at the Waterside and East River stations, what in your opinion would the effect be upon air pollution? A. Well, our calculations indicate that if boilers 71 and 72 were to be fired with natural gas, while the remaining eight boilers at Waterside remain on coal, as at present, the flyash emission to the air from this station would be reduced approximately 60 per cent to some 11,500 pounds of flyash, and the sulphur dioxide gas would be reduced some 22 per cent to 280,000 pounds per day.

Carrying these calculations further, if eight of the boilers at Waterside, including 71 and 72 were to be placed on gas and only two boilers were to remain on coal, the flyash emission would be reduced to approximately one-sixth of its present value and, similarly, the sulphur dioxide emission would be reduced to one-half of its present value. It is obvious, therefore, that in order to achieve the maximum reduction in objectionable emissions from this power plant, situated in the heart of the most intensively developed residential and commercial area of Manhattan, it is necessary to reduce the consumption of coal to its practical minimum.

While all of the foregoing calculations have been made with reference to the Waterside station, nevertheless they apply with equal force and substantially the same numerical results to the East River plant.

Q. How, Doctor, do you determine the quality of sootfall? A. We have at 26 locations throughout the city wherein they expose jars, ordinary glass jars of a standard size on the roof of the building, some four feet above the roof level, to catch the dust, the soot which falls at these locations. We

have 26 such stations which we have been following now, substantially that number—it varied between 22 and 26—for the last four or five years. Now the results of these samplings at the stations nearest the power plant with which we are concerned show that the sootfall in the neighborhood of these plants is higher than other locations in the city. As a matter of fact, the locations of the jars, as I remember it and now I am trusting to memory, is in a westerly direction from these two plants, where as a matter of fact it would be more logical to take samplings on the east side of the plant. But, of course, because of the location of the river we can not do this very well. The prevailing wind in New York is, in general, westerly, northwest or southwest, and the sampling jars, to be more specifically applicable to Con Edison, should be directly to the east of the plant. So I would say that our sootfall findings in general indicate a lower degree of sootfall deposit with reference to Con Edison than really exists.

Our sootfall records indicate that in the vicinity of these two power plants the sootfall averages range between 92 and 94 tons per square mile per month and has a maximum range of 142 to 149 tons per square mile per month. And these figures compare with an average for most of the polluted boroughs of the city—I am striking out one very sparsely separated borough, namely, the Borough of Richmond, Staten Island—but these two figures which I have cited can be compared with the polluted boroughs average of 72 tons per square mile per month for the entire year. In other words, there is a difference there in sootfall on the average of approximately 20 tons per square mile per month between the jars located nearer Con Edison as compared with the average for the polluted boroughs of the city.

Q. From what you have set forth in your testimony, Dr. Greenburg, what conclusion have you arrived at? A. Well, it is our firm conviction that there is no other plan which can be proposed which would give the citizens of this city, of

New York City, the relief they need from the nuisance of flyash and sootfall and from exceedingly large amounts of sulphur as will the conversion of as many boilers as possible at both Waterside and East River plants to natural gas. An important consideration, in our thinking, is the fact that the conversion of boilers to natural gas can be made within a 12-month period, whereas the installation of new boilers, or of more improved flyash collecting equipment, if such equipment ever becomes available, would take a long period of time, something of the order of probably about four years.

Q. Has recognition of this problem been given by other agencies? A. I would say yes, sir. The Federal Power Commission and other governmental agencies are justly concerned with the nation's natural resources, and we must not overlook the fact that the very air we breathe is perhaps our most precious natural resource. This is not replaceable. We live in an envelope of air, and we can not afford to have our atmosphere become polluted to any great degree. The ingenuity of man can find and develop many sources of power and many sources of food, but there is no substitute for the atmosphere in which we live and work. Air pollution can not continue to remain an uncontrolled problem. Depletion of this natural resource must be avoided at all costs.

And may I add that with the great increases in population which are taking place in our country today, population increases at the rate of approximately 3 million persons a year, the increase in urbanization which is taking place, the increase in the consumption of electric power—I have forgotten exactly what the average figure is, I think electric power has increased some 43 or 45 per cent in the last four or five years—I think under the conditions we have to realize that with these factors changing and the increase in industrialization we must be exceedingly careful or more and more cities of our country will overstep the bounds of reasonable limits of air pollution and then when meteorological conditions turn against us on some occasions as they have in Los Angeles, we are going to be in serious trouble.

I might mention that when this happened in the City of London, England, 4,000 people died in a period of about two weeks. This can happen other places, and this is something which requires long-range planning, and it is in terms of this which I, as Commissioner of Air Pollution of the City of New York, am now thinking and trying to transmit to your Commission.

Q. Do you have any final comment by way of summary? A. We have considered this problem at great length, we live with it each day and a good part of the night, and have for a long time. And as a result, we are firmly convinced that the health and comfort of the citizens of this city, including not only those in the immediate vicinity of these power plants, but those further away as well, requires the consent of your Commission to the transportation of gas for use in these power plants.

If the Federal Power Commission wishes to aid the people of the city of New York, and at the same time carry out the expressed intent of Congress in the reduction of air pollution, the approval of the use of gas as requested in the proceedings being heard here is one of the most significant ways in which the Commission can make a constructive contribution to the welfare of the people of New York City.

APPENDIX C

1. Pertinent Provisions of the Natural Gas Act

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U. S. C. § 717 (a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are here-

by declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U. S. C. § 717(c)]

SEC. 2. When used in this act, unless the context otherwise requires—

• • •

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

• • • [52 Stat. 821 (1938); 15 U. S. C. § 717a]

• • •

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

• • • [52 Stat. 822 (1938); 15 U. S. C. § 717c]

• • •

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * [52 Stat. 823 (1938); 15 U. S. C. § 717d]

* * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or

artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f(a)]

• • •

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)]

• • •

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

• • •

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

• • •

STATE COMPACTS; REPORTS ON

SEC. 11. (a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

(c) In carrying out the purposes of this act, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission. [52 Stat. 827 (1938); 15 U. S. C. § 717j]

• • •

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. • • •

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclu-

sive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * [52 Stat. 831 (1938); 15 U. S. C. § 717r; as amended by P.L. 85-791, 85th Cong., 2nd Sess. (1958)]

ENFORCEMENT OF ACT; REGULATIONS AND ORDERS

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

* * * [52 Stat. 832 (1938); 15 U. S. C. § 717s]

* * *

2. As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session, 52 Stat. 825, Section 7(c) read as follows:

(c) No natural-gas company shall undertake the construction or extension of any facilities for the transporta-

tion of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.